EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104095/2020, 4104097/2020, 4107500/2020 and 4107501/2020

Preliminary Hearing held remotely on 18 May 2021

Employment Judge A Kemp

Mrs Aileen Harrower	**First claimant** **Represented by:** **Ms R Jiggens** **Paralegal**
Mrs Lorraine McVicars	**Second claimant** **Represented by:** **Ms R Jiggens** **Paralegal**
Saturn (Scotland) LLP	**First respondent** **Represented by** **Mr A Bourke** **HR Consultant**
Andrew Bourke	**Second respondent** **In person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Tribunal refuses the respondents' application for strike out under Rule 37 of the claims.**

2. **The Tribunal refuses the claimants' application for strike out under Rule 37 of the second respondent's response.**

REASONS

Introduction

1. This was a Preliminary Hearing held to consider application made by both respondents to strike out the claims on the grounds that they had been conducted by the claimants' representative scandalously, unreasonably or otherwise vexatiously. The claimants also applied for strike out of the response of the second respondent. The hearing was held remotely by cloud video platform although the second respondent chose to attend by audio only. I was satisfied that the hearing was conducted appropriately in accordance with the overriding objective.

2. The applications are addressed following an earlier Preliminary Hearing on 7 May 2021 after which a Judgment and Note were issued. The four claims have been combined, subject to any jurisdictional arguments that may be made.

(i) Respondents' application

Submissions

3. Mr Bourke had sent to the Tribunal an email with his argument for strike out on 3 May 2021 and separately a detailed written application setting out his arguments and copying a number of emails on which he founded, and had also sent a video recording of a conversation held remotely by him and the claimants' representative Ms Jiggens. By agreement I viewed that in advance of the hearing. I also had read the written submission. Ms Jiggens had also sent the Tribunal an email with comments. Both parties made supplementary oral submissions.

4. In very brief summary Mr Bourke argued that the manner in which Ms Jiggens had conducted the remote meeting between them, and the email correspondence, fell within the rule, and that strike out was proportionate. The principal arguments are summarised in the discussion below. Ms Jiggens argued that she had not been acting unreasonably or otherwise improperly, explained that she had autism and ADHD, and argued that in any event strike out would be disproportionate.

5. In support of her own application Ms Jiggens referred to the submissions she had made to oppose the respondents' application and argued that the conduct of the second respondent met the high threshold of Rule 37 and that to strike out the response of the second respondent would be proportionate. She argued that there had been an ongoing catalogue of false claims as to fact and law, and that the second respondent had shown deeply questionable judgment.

The law

6. A Tribunal is required to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
>
> 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."

7. Rule 37 provides as follows:

> "**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……
>
> (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)."

8. In ***Blockbuster Entertainment Ltd v James [2006] IRLR 630*** the Court of Appeal held that there are two "cardinal conditions" for the exercise of a strike out, namely, that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible. Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question. Sedley LJ stated that strike out under the rule is "a Draconic power, not to be readily exercised".

9. The scope of the rule had earlier been examined by the Court of Appeal in ***Bennett v London Borough of Southwark [2002] IRLR 407*****.** The claimant's lay representative, who was black, having applied for, and been refused, an adjournment on the twelfth day of a race and sex discrimination claim, made these remarks to the tribunal: 'If I were a white barrister I would not be treated in this way', and 'If I were an Oxford-educated white barrister with a plummy voice I would not be put in this position'. The tribunal discharged itself on the ground that it could not continue to hear the case when it had itself been accused of racism. The case was relisted before another tribunal which, following a hearing, ordered the claim to be struck out under what is now Rule 37, on the grounds that the representative's conduct of the case had been scandalous. The Court of Appeal held that the first tribunal had been

wrong to recuse itself in the way it did, and the second tribunal had been wrong to strike out the claim. It remitted the case to a fresh tribunal for a complete rehearing of the claimant's claim.

10. Dealing with the terms of the predecessor to Rule 37 the 1993 rule, Sedley LJ observed that it was directed to the conduct of proceedings in a way which amounts to abuse of the tribunal's process, abuse being 'the genus of which the three epithets scandalous, frivolous, and vexatious are species'. The same comments apply to the 2013 rule, although in Scotland the phraseology that may be more apt is the construction of the terms of the Rule by the ejusdem generis principle. The fact that the acts complained of are by the representative not the party is also relevant, and means that, before a claim is struck out on the grounds of a representative's conduct, the party should be given the opportunity to dissociate himself from what the representative has done. It was also held that the meaning of the word 'scandalous' in the rule is not its colloquial meaning; it is therefore not a synonym for 'shocking' but it embraces both 'the misuse of the privilege of legal process in order to vilify others', and 'giving gratuitous insult to the court in the course of such process' (para 27). As stated above, not only must the conduct be shown to have been scandalous unreasonable or vexatious, but it must also be such that striking out is a proportionate response: “it is not every instance of misuse of the judicial process, albeit it properly falls within the description scandalous, unreasonable or vexatious which will be sufficient to justify the premature termination of a claim or of the defence to it”. The same principle applies to an application by the respondent. On the facts of the case, it was doubted by Sedley and Longmore LJJ whether the striking out was a proportionate response to the situation that had arisen, and for Ward LJ, held that it was disproportionate to do so.

11. In that case the outcome was that the appeal against the strike out was allowed, and a new Final Hearing arranged with a different Tribunal, such that the initial days of evidence required in effect to be re-heard. By seeking a strike out in circumstances which did not warrant it, the party doing so had not curtailed the proceedings as they had hoped, but rather extended them materially, causing additional expense and delay.

Discussion

12. I did not consider that the first stage of the test, as to whether the behaviour fell within the statutory language had been met. The test is a relatively high one. The behaviour must be such that there has been a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible. In this case the latter of those is the one that might be argued to apply, but I consider that it does not.

13. Whilst some of the behaviours of Ms Jiggens are surprising and may border on being improper, such as writing to the members of the first respondent (who are being served with the proceedings as new third and fourth respondents following the last Preliminary Hearing) in which she suggested that they may wish to consider new representation, she is not a solicitor and nor is Mr Bourke, and professional practice matters that would arise for a solicitor do not arise for either representative. In any event, matters of professional practice are not determinative. The respondents have also not changed their representation, and there is an email to indicate that they do not intend to do so.

14. Some of the style of communication is brusque, indeed combative, but that is by no means unusual, and it did not begin to approach a level that makes a fair trial impossible in my assessment. Tribunal processes are adversarial. A representative is entitled to pursue the best interests of the clients they represent. That may require representatives on both sides of the argument, particularly those paid for doing so, to have what may be described as a thick skin at times.

15. The video recording did not display any undue level of aggression by Ms Jiggens. She was entitled to say what she said. She did not conduct the meeting unduly aggressively. Whilst the parties might have been more conciliatory and co-operative in addressing case management, and progressing the claims effectively, indeed I have in the past reminded both representatives of their duty under Rule 2, there was nothing from the recording of the meeting that I viewed that would reasonably be regarded as having made a fair trial impossible. Ms Jiggens in her response set out

a number of points of fact that contradicted the allegations made by Mr Bourke, and on them I consider that Ms Jiggens was correct.

16. Mr Bourke complained that Ms Jiggens had improperly carried out calls to his business number, and other what may be termed electronic surveillance, which he alleged as a form of cyber stalking. But she was entitled to. He had represented to the Tribunal in making an application to adjourn an earlier hearing that he was not fit to work or attend hearings and on behalf of her clients she did not accept that that was the case. Her clients wished to avoid delays. She was entitled to make enquiries about that, and did not do so in a manner that I consider transgresses the line of being within the steps a representative of claimants said to be suffering serious mental health issues from what has happened could take. Both the allegations in relation to that matter made by Mr Bourke and other allegations that what happened was bullying, intimidating or similar improper behaviour I did not accept.

17. He also complained about arguments put to him both in the video and by email, with which he disagreed. That included in relation to the second claimant, in respect of whom disciplinary proceedings have been intimated but not concluded. Ms Jiggens argued that any dismissal would be unfair and unlawful. She was entitled to make those arguments. They may or may not be right in law, but if parties cannot agree matters between them the first respondent will require to decide what to do, carry that out if appropriate and the Tribunal will hear evidence and argument if necessary after any amendment to the pleadings and decide the issues before it. That is what it is for.

18. It is also not clear, at the best for Mr Bourke, that he has a full and accurate understanding of the law. He made comments in email correspondence for example to the effect that a private individual could not be liable for discrimination in the circumstances, which is not correct given the terms of sections 109 – 112 of the Equality Act 2010, the EHRC Code of Practice: Employment, and case law on that matter. Other examples are commented on below.

19. There were issues raised as to a subject access request which the claimants say has not been complied with unlawfully, but that is not a matter under the jurisdiction of the Tribunal, and in any event Ms Jiggens was entitled to put arguments on that aspect if she wished to in order to seek documents for her clients. If there is a dispute over that subject access request, there are other bodies competent to address it.

20. He complained about correspondence to his clients directly, and it would certainly have been better if Ms Jiggens had not written to the individuals, and in the terms that she did. Where representatives are engaged it is obvious that the correspondence should be with them. But Mr Bourke himself wrote to the claimants. The individuals did not act on the suggestion of taking alternative legal advice, and have remained with the second respondent as their representative.

21. Ms Jiggens set out arguments in defence of this application that she also raised in support of her own, and they are addressed below.

22. In conclusion on this aspect I did not consider that the first stage of the test had been met. In any event, even if the first stage had been met, I consider it clear that strike out would not be proportionate. That is indicated by the comments of the Court of Appeal in ***Bennett*** in which wholly improper remarks directed to the Tribunal itself were not held to be sufficient for that draconian remedy. It is one to be used sparingly. This is not near to being a case to do so, in my judgment. I consider that a fair trial of the issues in the cases remains possible. The claimants have claimed disability discrimination. There is a public interest in having such cases heard, as has been commented on in a number of cases in the related area of arguments for strike out on the ground of no reasonable prospect of success. Whether or not the claims succeed is a different matter, but the claimants are entitled I consider to be able to put their evidence and arguments to the Tribunal, and the acts of their representatives are nowhere near sufficient to take the draconian step of denying them that.

(ii) Claimants' application

Submissions

23. Ms Jiggens set out her arguments for strike out of the response of the second respondent alone, and the following is again a very brief summary. Firstly she argued that the second respondent had made claims as to matters of fact that were demonstrably false from the documentation he himself had sent to the Tribunal in support of his own application, or which were contradicted by the video recording referred to. She set them out in detail. I have concluded that it is better not to set them out in detail and offer a view on them lest they be raised in evidence at the Final Hearing. It did appear on a provisional review of the same that much of what she said was likely to be correct, but whether that was by inadvertence on the part of the second respondent or deliberate misrepresentation is not something one can decern purely from the terms of written documents. Secondly she argued that there were a number of errors of law exhibited in that documentation. As examples the second respondent continues to argue that a private citizen cannot be liable under the Equality Act 2010, he argued that an email sent to his work email address when he was on holiday was a breach of the Human Rights Act 1998, he argued that Tribunals do not publish Judgments on strike out online, an email from Mr Pain to the effect that a Sheriff had confirmed that there had been no breach of the Data Protection Act 2018 by the first respondent, which it was inferred came from advice from the second respondent, the claim by the second respondent to legal advice privilege when he was not a solicitor or advocate, a claim to litigation privilege for a period when it was accepted that there was no “actual case” before at the earliest June 2020, and in relation to three cases which he had cited which had the opposite outcome to that he contended for. Thirdly there were arguments of errors of judgment, accusing Ms Jiggens’ colleague of harassment and abuse of him and his family when emailing him to his work email when on holiday, a disruptive course of conduct such as responding to proposals on a case management order by alleging abuse, false claims as to delays by Ms Jiggens in December 2020, a failure to consider the mental health of the two claimants despite being given full evidence of that and the issue of their distress being intimated to him on several occasions, not providing documentation despite requests in October 2020, a lack of clarity on his own role, with two companies with which he was associated not complying with legal requirements, later clarified as under section 82 of the

Companies Act 2006 and regulations made thereunder being the Companies Act (Trading Disclosure) Regulations 2008 and Regulations 6 and 7, claims made in relation to the companies Absolutely HR Ltd and Absolutely Employment Law Ltd, and an argument that Ms Jiggens was pursuing claims against the second respondent as an individual without lawful basis. She argued that there was no or little prejudice to the second respondent as he would give evidence, matters would be addressed, and he would only have a liability if the first respondent did, and it would then be joint and several. She suggested that it would assist his mental health not to have the stress of defending the claim against him.

24. The second respondent replied by saying that Mr Pain had used the wrong term. When asked what the right term was, he referred to the Employment Judge, and when told that the Judge does not have jurisdiction over subject access requests he was not able to explain further. He said that he had set out how he feels over matters. He set out arguments over the remote meeting, and that that had been a personal attack on him, that he found incredibly difficult to deal with. He argued that Ms Jiggens had caused delay around Christmas 2020, and had left an out of office message as to a return in January 2021. It had not been his fault that earlier hearings had been adjourned, for issues outwith his control one of which was a life-threatening illness of his school age daughter. The remote meeting had addressed irrelevant issues. When it was suggested by me that the question of whether he was an agent of the first respondent was an issue before the Tribunal, such that enquiry of and around that was at the least not irrelevant he did not expand further on that point. He argued that the step of strike out was draconian

The law

25. This is as above.

Discussion

26. I did not consider that the application met the statutory test. Firstly, whilst there have been an unusually high number of applications both formal and informal, they have come from both claimants and respondents. They have now been addressed, and case management orders made with a

view to a Final Hearing later this year. Secondly, whilst there may be something in at least some of the submissions that inaccurate at best, and dishonest at worst, may have been made, assessing that properly requires evidence. Thirdly the arguments as to errors of law is at least partly correct, and in material respects. The issue of potential personal liability has been addressed above. The second respondent admitted in the hearing before me to being an agent of the company he is associated with, but not of the first respondent which is the material matter at issue. That is the subject of an order made earlier, and if it is a live matter after a response to that order is given will require evidence. That evidence may include issues around messages sent by the second respondent for one or other of the said companies, which on the face of it did not conform to the statutory provisions under the Companies Act 2006 referred to, and appears on many occasions on email headers for Absolutely HR Ltd, not Absolutely Employment Law Ltd, but not with a clear reference to the fact that the entity was a limited company and not on the face of it with the statutory information under those provisions. His arguments that these points were irrelevant did not appear to me to be correct, but what effect that has on the issue of whether the second respondent was an agent of the first respondent may depend on all the evidence around that issue and submissions.

27. The second respondent has pursued his own application notwithstanding the reference to the test set out in ***Bennett*** in the earlier hearing. His reference to case law is at times not accurate, seeking to argue that it leads to a conclusion that it does not, on my own reading of it. That included the issue of privilege for example, when the case he prayed in aid did not support the argument that those not legal qualified such as solicitors, advocates or those employed in such roles were entitled to its protection. The protection is in the separate sense normally referred to as litigation privilege, which is a shorthand for Scots Law on the issue of what evidence is admissible. Some of the allegations made against the claimants' representatives are at best hard to understand, and at worst wholly misconceived. That latter description applies for example to an email sent to the second respondent's own business email account, for perfectly legitimate reasons, by Ms Paton and received when he

happened to be on holiday. To suggest that that was a breach of a human right shows what I consider to be a misunderstanding of the law in that field. There are other examples of what appear to be groundless accusations of improper behaviour for Ms Paton or Ms Jiggens pursing matters for their clients in a manner that they are entitled to. Whether their arguments are right or wrong is not the point, they are entitled to make them, and if not accepted in discussion the Tribunal will make a decision on them in due course. The number of such accusations and the limited extent to which they were justified is a matter of some concern.

28. But however concerning such matters are, I am not satisfied that they meet the test explained in authority above, where the conduct is such as leads to a fair trial not being possible, and even if they did I am entirely clear that it is not proportionate to grant the application to strike out the response. The second respondent is entitled to defend the claims made against him as an individual, unless the Tribunal holds otherwise for other reasons. He is in any event also the representative of the first respondent. He may yet be the representative of the third and fourth respondents once they are served with the proceedings. He will continue therefore to be engaged in matters pertaining to the claims made, and their defence for the first respondent. It is not an easy argument for an opponent to make that the other party will benefit by not being able to defend the claim against him. His inability to defend the claim may cause him substantial prejudice. Strike out is a draconian step as has been commented on above, and I consider that this is not a case where it would be appropriate to take that step. Whether or not his defence to the claims succeeds is a different matter, but the second respondent is entitled I consider to be able to put his evidence and arguments to the Tribunal. The case management orders made at the last Preliminary Hearing will I hope allow parties to focus on the preparation for the Final Hearing. I comment on that aspect further below. A fair trial remains possible in my judgment. The application by the claimants is therefore refused.

Conclusion

29. The applications for strike out by each of the respondents and by the claimants are accordingly refused.

30. Mr Bourke was asked at the conclusion of the hearing if he wished to make any submission on the respondents' five other applications which had been made previously by email, and which were to have been dealt with at the last Preliminary Hearing but were not then moved. It was confirmed that he did not. I shall hold that they have all been withdrawn. If the respondents wish to make such arguments as were made by those email applications in future, and I do not encourage them to do so, a fresh application will be required. Arguments as to jurisdiction can be made at the Final Hearing as referred to in the Note issued following the earlier Preliminary Hearing.

31. I expressed the hope that the parties would focus their efforts on complying fully with the orders made for case management such that the Final Hearing can proceed on the dates fixed for it. In the event that that does not occur, and a party is in material breach of an order in a manner which imperils the Final Hearing proceeding on the dates fixed, that may require separate consideration, depending on the circumstances and submissions made.

Employment Judge A Kemp

Date of Judgment 20 May 2021

Date sent to parties 24 May 2021