Case No: 2202017/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms B Nishat

Respondent: Mr R C Dart

Heard at: London Central (by CVP) **On: 14 February 2022**

Before: Employment Judge H Grewal

Representation

Claimant: In person

Respondent: Mr E Kemp, Counsel

JUDGMENT

The claim is struck out.

REASONS

1 This was a hearing of the Respondent's application of 9 February 2022 to strike out the claim on the grounds that it was scandalous and vexatious, the manner in which proceedings had been conducted by or on behalf of the Claimant had been scandalous, unreasonable and vexatious and that it was no longer possible to have a fair hearing.

Procedural history

2 In a claim form presented on 9 April 2020 the Claimant complained of disability discrimination and claimed that she was owed holiday pay, arrears of pay, notice pay and medical expenses. Following a payment by the Respondent without any

admission of liability, the Claimant withdrew her claims for notice pay, holiday pay and arrears of pay.

3 The claims and issues to be determined were clarified at a preliminary hearing on 16 June 2021. The only complaints left before the Tribunal were those of disability discrimination and breach of contract. It was not in dispute that the Claimant had been employed by the Respondent as a nanny and governess from 18 July 2019 to 15 November 2019. On 6 September 2019 she travelled to the USA with the Respondent and his family and on 27 September she was involved in a road accident as a passenger in an Uber vehicle. It was not in dispute that the Claimant had been injured in the accident and as a result had needed medical treatment in the USA. The issues to be determined in respect of the complaint of disability discrimination complaints were (i) whether the Claimant had been disabled from 27 September to 15 November 2019 (ii) whether the Respondent knew or could reasonably have been expected to know that and (iii) whether her dismissal had been an act of direct disability discrimination or discrimination arising from a disability. The issues in respect of the breach of contract claim were (i) whether the Claimant was contractually entitled to recover her medical expenses from the Respondent and (ii) whether her medical expenses had been covered by Uber and to what extent she had mitigated any loss. The case was listed to be heard on 10, 11 and 14 February 2022.

4 The Claimant's pleaded case was that the Respondent was contractually obliged to pay her medical expenses from the date of the accident to the termination of her employment as the Claimant incurred those expenses while working for the Respondent. She claimed that she had incurred medical expenses of $333,000 during that period. The Respondent's position was that there was no contractual obligation to pay the expenses because as the Claimant had not been working when she sustained the injuries. He argued in the alternative that, if the Claimant was found to have been working at the time of the accident, he believed that her medical expenses had been fully covered by Uber and she had, therefore, mitigated her loss.

5 Prior to the commencement of proceedings Edward Starmer, in-house counsel for the Respondent's company in the USA, in open correspondence with Doreen Reeves, the Claimant's solicitor, said that as far as the Claimant's claim for medical expenses was concerned, the Respondent had been reliably informed that the Claimant had stated to his security team that she had received a six figure sum from Uber's insurers in connection with the incident. He said that the Claimant should disclose all of her correspondence with Uber and their insurers in connection with the accident, any claims made and any payments received or offered. Ms Reeves responded on 27 March 2020. She attached a breakdown of the Claimant's medical expenses and invoices dated from 27 September 2019 to 22 October 2019 that came to a total of $268,974.42. She said,

> "*Our client has instructed that she has not received any sums from Uber and the source of your information is unreliable."*

6 In a Schedule of Loss dated 7 July 2021 the Claimant claimed that she should be re-imbursed medical expenses of $268,974.42 (which equated to £195,095.50). £25,000 was claimed as damages for breach of contract (that being the maximum that the Tribunal can award) and the rest as compensation for disability discrimination. The Claimant indicated that she would seek interest on that award. An

updated schedule of loss, submitted on 1 December 2021, included interest. The total amount claimed by the Claimant was £395,181.41. It still included $268,974.42 for medical expenses.

7 On 19 November 2021 Harriet Dwyer, the Respondent's solicitor, wrote to Ms Reeves on receipt of the Claimant's disclosure. She noted that it had not included any documents relating to mitigation and asked Ms Reeves for certain categories of mitigation documents which included copies of all correspondence between the Claimant and Uber regarding the accident in which she been involved. Ms Reeves responded on 9 December 2021,

> "*Our client has already confirmed that Uber did not cover her medical expenses as her employer was liable. Our client can provide further details of her conversation with Uber on this issue at the hearing and your counsel will have the opportunity to cross examine her. She therefore has no further evidence to disclose on this matter."*

8 On 7 January 2022 Ms Dwyer asked the Claimant's solicitor to provide further details of the conversation that the Claimant said that she had had with Uber, such as when the conversation had taken, to whom had she spoken, what had been said. On 10 January Ms Reeves responded that the Claimant would deal with that in her witness statement. There was further communication between the lawyers on the issue, but no further information was provided by the Claimant.

9 On 10 January 2022 Ms Dwyer asked Ms Reeves to provide evidence that the Claimant had paid the medical invoices which had been sent to her and which she had disclosed. On 20 January 2022 the Claimant's solicitor provided an updated copy of the breakdown of the Claimant's medical expenses which showed which invoices had been paid by the Claimant. This showed that the Claimant had paid only $1,219.45 out of the $268,974.42 which had been invoiced.

10 On 24 January Ms Dwyer sent an email to Ms Reeves with a request for the Claimant to disclose any correspondence between herself and the medical centres whose invoices she had not paid. Ms Reeves responded on 26 January,

> "*We have provided you with the documents in our possession and do not have any further disclosure for the agreed bundle."*

11 On 3 February 2022 at 13.51 Ms Dwyer, having received further information from M Starmer in the USA, wrote to Ms Reeves as follows,

> "*The Respondent's US attorneys have been making enquiries with Uber in relation the accident your client was involved in on 27 September 2019. They have received verbal confirmation from an adjuster at Uber's insurers, Progressive, that your client did in fact receive a payment from Uber and they believe that this was up to $250,000. This is being followed up in order to obtain written confirmation. Please can you take your client's instructions on this."*

12 Witness statements were exchanged on 4 February 2022. In an email at 16.32, to which the Claimant's witness statement was attached, Ms Reeves said,

> "*We wish to draw to your attention that paragraph 83 contains an error which was only discovered today. We will call to speak about this."*

The Claimant's witness statement was signed and dated 3 February 2022. In paragraph 83 the Claimant said,

> "*The Respondent has since suggested that I have received a six-figure sum from Uber's insurer following the accident… This is categorically untrue and was confirmed to the Respondent's attorney in the US.. This was later re-confirmed to the Respondent's solicitors in the UK."*

13 On 7 February the Respondent's solicitors wrote to the Tribunal and Ms Reeves. They set out all the above matters and applied for specific disclosure of the Claimant's non-disclosure agreement with Uber, any other correspondence between the Claimant and Uber and correspondence between the Claimant and her solicitors relating to her conversations with Uber and the related claim. They also sought an explanation from the Claimant's solicitors as to how the Claimant had misled the Respondent and the Tribunal. A partner in the firm acting for the Respondent sent a copy of that letter to Ms Reeves and the head of employment in the solicitors' firm acting for the Claimant. Ms Mackie, the head of employment, responded,

> "*If you will allow me overnight and early morning to review I will revert then, from what I can see so far I suspect our client has misled us all."*

14 On 7 February Ms Reeves wrote to the Tribunal that an issue had arisen following information they had received form their client. It had compromised their position and they were considering withdrawing from the case. On 9 February at 15.24 Ms Reeves wrote to the Tribunal that the firm had decided that they were unable to act for the Claimant and would be coming off the record. Later that evening the Respondent's solicitor made a number of applications, one of which was to strike out the claim. A witness statement from Ms Dwyer and a skeleton argument were provided in support of that application.

15 The parties attended the Tribunal (by CVP) on the morning of 10 February when the final hearing of this case was due to start. The Claimant was not represented. It was abundantly clear to me that in light of the number of applications being made, the final hearing could not go ahead and I vacated that. I then considered some of the Respondent's applications for specific disclosure against the Claimant and the solicitors. The Claimant maintained that she had no correspondence with Uber or its insurers and that there was no settlement/non-disclosure agreement between herself and Uber or its insurers. As far as the application to strike out the claim was concerned I was prepared to give the Claimant some time to prepare her response to it but I was not to adjourn it for a longer period to enable the Claimant to obtain legal representation. Not only was there no indication of whether that would be possible or how long it would take but it also appeared from all the evidence before me that the Claimant bore considerable responsibility for the late withdrawal of her solicitors. I adjourned the matter to 14 February 2022 to consider the application to strike out.

Privilege against self-incrimination

16 At the outset of the hearing on 14 February I reminded the Claimant of her right in these proceedings to refuse to answer any question or to provide any documents if to

do so would tend to expose her to proceedings for a criminal offence or to a penalty in the criminal courts.

Admissibility of evidence which had been labelled as "without prejudice" conversations

17 Prior to making the application to strike out the claim, the Respondent applied to admit the evidence of a telephone conversation that took place between Ms Dwyer and Ms Reeves on 4 February at 16.34 p.m. and an email that was sent from Ms Reeves to Ms Dwyer on the same day at 18.34. The telephone conversation took place 2 minutes after the email in which Ms Dwyer said that there was an error in paragraph 83 of the Claimant's statement which had only been discovered that day and that she would call her to speak to her about it. Ms Dwyer made an attendance note of that conversation which accorded with what she said in paragraph 31 of her witness statement. Ms Reeves said at the start of the conversation that it was "without prejudice" and "confidential". In respect of the error in paragraph 83 she said that the Claimant had entered into a non-disclosure agreement with Uber and had received a sum of money. She said that she could not disclose the details because the Claimant feared that if she did she would be in breach of the agreement and would have to repay the money. Ms Reeves made reference to the position in the US relating to non-disclosure agreements being different. Ms Dwyer said that they believed that the Claimant had been paid $250,000 which equated to about £160,000. Ms Dwyer rejected the Claimant's without prejudice offer to settle for £266,000 and made the point that it was unreasonable for the Claimant to pursue her client for that sum of money with the knowledge that she had received money from Urber. She said that that should have been reflected in her schedule of loss. Two hours later Ms Reeves sent Ms Dwyer an email headed "without prejudice" in which she said that schedule of loss served in December 2021 had been for £395,181.41 but would be reduced to £255,181,41 (a reduction of £160,000) "*for reasons which we have discussed."*

The Law

18 Written or oral communications made as part of negotiations genuinely aimed at, but not resulting in, settlement of a dispute are not generally admissible in evidence in litigation between parties over that dispute. The public policy behind the rule is the desirability of encouraging litigants to settle their disputes by agreement rather than to litigate them to a finish and, to this end, of ensuring that negotiations are not trammelled by the fear that what is said will be used in evidence. For the rule to apply, there must be an existing dispute between the parties at the time the alleged "without prejudice" communication is made, coupled with a genuine attempt to settle it.

19 However, the privilege must not be abused. The rule cannot, for example, be relied on if the exclusion of evidence of what a party said or wrote in without prejudice negotiations would "act as a cloak for perjury, blackmail or other unambiguous impropriety" – **Unilever PLC v The Proctor & Gamble Ltd [2000] 2346**. It has, however, been made clear that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

Conclusion

20 It has always been a central issue in this case whether the Claimant received any payment from Uber or its insurers in respect of the accident and her medical expenses. The Claimant has steadfastly maintained from before the start of the proceedings that she has not received any payment from Uber and on that basis made a claim against the Respondent for nearly $269,000 (or £195,000). She maintained that position in paragraph 83 of her witness statement. The main purpose of the telephone call was to explain why what was said in paragraph 83 was not correct, although I accept that there was some discussion about settlement because the latest offer put forward by the Claimant was rejected. I consider that the "without prejudice" label was attached to it to prevent its content being used in the proceedings because it seriously undermined the Claimant's case. If the rule of privilege were to be applied, it would conceal from the Tribunal crucial evidence on one of the central issues in the case. I consider that to be an abuse of the protection of the rule of privilege. What was said in that telephone conversation is on the face of it evidence that the Claimant had misled her own solicitors, the Respondent and the Tribunal about the true position, and that she was trying to claim that she was entitled to recover sums of money from the Respondent which she knew that she could not. Allowing the privilege to apply to it would act as a cloak for potentially serious wrongdoing by the Claimant. It would enable the Claimant to pursue a claim which she knew was not true and to seek to recover money to which she was not entitled. There is clear evidence of what was said. Ms Dwyer made a contemporaneous note of it. The actions of Ms Reeves just before and after the conversation are entirely consistent with Ms Dwyer's note of it. I am satisfied that this is one of those unusual cases where the exclusion of that evidence would act as a cloak for unambiguous impropriety. I ruled that that evidence and the evidence of the subsequent email which referred to that conversation was admissible.

21 Ms Dwyer gave evidence in the hearing before me and produced her attendance note. The Claimant did not challenge her evidence. The Claimant did not give evidence.

Strike out – the law

22 Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides,

> "*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 the response (or the part to be struck out).*"

23 Striking out is a draconian measure that should not be imposed lightly – **Blockbuster Entertainment Ltd v James [2006] IRLR 630**.

24 In **Bolch v Chipman [2004] IRLR 140** Burton P in the EAT held that when faced with an application to strike out under rule 37(1)(b) (he was dealing with an earlier iteration of it in the 2001 Rules of Procedure), the Tribunal must decide the following issues:

(i) There must be a conclusion by the tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably;

(ii) If there is a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, ordinarily that does not automatically lead to the claim or response being struck out. It can do so in certain limited circumstances, such as when there has been a "wilful, deliberate or contumelious disobedience" of the court's order. In ordinary circumstances what is required before there can be a strike out of a claim or a response is a conclusion as to whether a fair trial is or is not still possible.

(iii) If the Tribunal concludes that that the proceedings have been conducted in breach of rule 37(1)(b) and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion.

(iv) if the Tribunal considers that a strike out is appropriate it must consider what the consequence of that should be.

25 Where a Tribunal concludes that because of the nature of claimant's conduct it no longer has any trust in his/her veracity and that the loss of trust is irreparable, that can lead to the conclusion that a fair trial is not possible – **Chidzoy v BBC UKEAT/0097/17/BA** and **Sud v London Borough of Hounslow [UKEAT/0182/14/DA**.

Conclusions

26 I made the following findings of fact on the basis of the evidence before me. In the telephone call on 4 February 2022 Ms Reeves told Ms Dwyer that the Claimant had entered into a non-disclosure agreement with Uber and had received a sum of money. Ms Dwyer's evidence about that was not challenged, she made a contemporaneous note of that conversation and her evidence is consistent with the documentary evidence that preceded the call and followed it. Ms Reeves was given that information by the Claimant. Ms Reeves did not give evidence before me. However, I cannot think of any possible reason why Ms Reeves would make that up and communicate it to the Respondent's solicitor if it was not something that she had been told by her client. The Claimant has not put forward any explanation as to why she would do that. There is no reason why the Claimant would tell her solicitor that she had entered into a non-disclosure agreement with Uber and had received money if that did not happen. Furthermore, it is entirely consistent with the fact that the Claimant did not pay the bulk of her medical invoices and there is no evidence that any of the medical centres have been pursuing her for it. The only conclusion that I can draw from all the evidence before me is that the vast bulk of the Claimant's medical expenses were covered by Uber or its insurers.

27 It follows from that that the Claimant has sought to recover in this case large sums of money (the equivalent of about $250,000 – 260,000) either as damages for breach of contract or as compensation for disability discrimination when she is in fact not entitled to them because she did not incur those expenses. The position that she has steadfastly maintained since March 2020, and appears still to maintain, is that she has not received any sums from Uber (see paragraphs 5, 7 and 15 above). The only inference to be drawn from the evidence before me is that the Claimant has over a long period of time misled her solicitor, the Respondent and the Respondent's solicitor and has sought to mislead the Tribunal. I concluded that the manner in which the proceedings have been conducted by the Claimant has been scandalous, vexatious and unreasonable. It goes further than that because the conduct in question goes to the heart of the substance of the case. It does not relate to how the Claimant has behaved in the course of the proceedings, it relates to what she is claiming. It means that a very large part of her claim is scandalous and vexatious.

28 I then went on to consider whether a fair trial is still possible although it appeared to me that this was one of those unusual cases where the conclusion that I reached about the nature of her conduct and the claim would be sufficient to strike out the claim. It is difficult to see how a fair trial could be possible in light of Ms Dwyer's evidence and the only conclusions that can be drawn from it. The Claimant has for nearly two years misled everyone in the process on an issue that is central to her claim. As a result of the Claimant's conduct the Tribunal cannot have any trust in her veracity and the loss of trust is irreparable. I considered whether there was any alternative to striking out the claim and could not see any. I concluded that I had no option but to strike out the claim.

29 I decided to strike out the claim because it is scandalous and vexatious, the manner in which the Claimant has conducted proceedings is scandalous, vexatious and unreasonable and I consider that a fair trial is no longer possible.

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Employment Judge - Grewal

14th Feb 2022____

JUDGMENT & REASONS SENT TO THE PARTIES ON

21/02/2022 .....

FOR THE TRIBUNAL OFFICE