



EMPLOYMENT TRIBUNALS

Claimant: Mr S Wong

Respondent: Royal Mail Group Ltd

Heard at: Newcastle (CVP)

On: 30 September 2022

Before: Employment Judge A.M.S. Green

Representation

Claimant: In person

Respondent: Mr R Chaudhury - Solicitor Advocate

RESERVED JUDGMENT

The claimant's claims are struck out under Rule 37 (1) (b)

REASONS

Introduction

1. For ease of reading, I refer to the claimant as Mr Wong and the respondent as Royal Mail. I owe Mr Wong an apology. On several occasions during the hearing, I incorrectly addressed him as Mr Young and I am sorry for doing so.
2. The purpose of this hearing was to consider Royal Mail's application to strike out Mr Wong's claims because of the manner in which the proceedings have been conducted are scandalous, unreasonable, or vexatious. Alternatively, the application is to strike out his claims on the basis that they are not been actively pursued.
3. The gist of Royal Mail's application is that Mr Wong engaged in a campaign of offensive and unreasonable behaviour with the express purpose of intimidating Mrs McDonald, one of Royal Mail's proposed witnesses, so that she would be precluded from participating in the Final Hearing scheduled to start on 1 November 2022.

4. Royal Mail alleges the following:
- a. Mr Wong directly confronted Mrs McDonald on 27 January 2022 and 28 April 2022 to intimidate her.
 - b. Mr Wong posted offensive messages about Mrs McDonald on his Facebook pages which were public facing. He made offensive remarks her hair loss and weight.
 - c. Mr Wong targeted Mrs McDonald's physical features by referring to them on a Royal Mail leaflet which he knew would come to the attention of her and their employees.
 - d. Mr Wong referred to algorithms and a female's weight, reinforcing the view that the posts were directed to insult and intimidate Mrs McDonald.
 - e. Mrs McDonald has confirmed that she has personally suffered from abusive treatment at the hands of Mr Wong.
 - f. Mr Wong has not actively pursued his case and has failed to comply with the Tribunal's request for comments by 30 June 2022. Royal Mail acknowledges that whilst Mr Wong responded to the Tribunal's request 12 August 2022, it is concerned that he will not provide a witness statement which will jeopardise the Final Hearing listed for 1 November 2022.
5. We conducted a video hearing and worked from a digital bundle. Although Mr Wong had not provided a witness statement, I exercised my powers under rule 41 to elicit evidence from him. Mr Chaudhury cross examined Mr Wong. Mrs McDonald had prepared a witness statement which was included in the bundle. She was not present did not give oral evidence. I heard oral submissions from both sides.
6. In reaching my decision I have carefully considered the oral and documentary evidence. The fact that I have not referred to every document in the digital bundle should not be taken to mean that I have not considered it.

The procedural history

7. On 21 April 2022, Employment Judge Beever conducted a preliminary hearing. He issued several case management orders including that the parties should exchange their witness statements by 25 August 2022. The parties did not exchange witness statements. I asked Mr Choudhury why Royal Mail had not provided their witness statements to Mr Wong, and he replied that the witnesses were reluctant to give evidence because of Mr Choudhury's intimidating behaviour which form the subject matter of this hearing before me. I asked Mr Wong why he had not provided his witness statement to Royal Mail. He said that he was not a lawyer, and he was at a loss. He then went on to say that it must have passed him by, and it was an oversight.
8. Regarding the other case management orders, I understand that Mr Wong complied with the obligation to provide his schedule of loss by 12 May 2022,

and he sent his documents relevant to the issues to Royal Mail by 9 June 2022.

The claims and response

9. Royal Mail employed Mr Wong in an Operational Postal Grade role from 9 September 2003 until he was summarily dismissed on 4 November 2021. He presented his claim to the Tribunal on 7 February 2022 following a period of Early Conciliation which started on 4 January 2022 and ended on 26 January 2022.
10. Mr Wong claimed that he was unfairly dismissed and suffered race discrimination. At the preliminary hearing on 21 April 2022, he indicated his intention to withdraw his race discrimination claim. He confirmed this in writing to the Tribunal on 26 April 2022. His particulars of claim are as follows:

18 yrs service! , racially abused, bullying & harassment! Recent fallout with "clique" whom run the office through nepotism! I'm aware of illegal activities (as are all of the employees) therefore I like others before me have been set-up & forced out! Anonymous phone calls by crimestoppers to say I'm a drug dealer etc! Colleagues before me (in this situation) have attempted suicide etc I was on the sick when my employment was terminated with mental health problems partly due to my work situation at the time! Numerous managers were aware of the abuse (reported) 7 in total.. But all failed to take it further! There's been a clear agenda to get me dismissed, whereas I don't harbour much hope at least if I can raise this issue (again) something may be done about the consistent nepotism/illegal activities including defrauding of Royal Mail (of which I have proof, but management disregard this is not important & were or are unwilling to look into it) hence more reason to assume a vendetta against myself! I was in the Xmas tv advert some years ago & represented the company thru obviously tv as well as media inclusive of newspapers & radio!... I feel a great injustice & going to the papers as may be my last port of call

11. Royal Mail say that they dismissed Mr Wong because of his conduct.

Findings of fact

12. On 24 December 2021, Mr Wong posted the following on his Facebook page [44]:

soo at a time of goodwill to all, men, women, then, it, whatever... I'd like to take a little time to also wish that elite few (you know whom u are) a slow and gruesome pain fuelled violently pitilessly ignominiously cruel death!!!! U cocksuckingmotherfuckingcunts... oh p.s. merry fucking xmas

When I asked Mr Wong to whom he was referring in this post he replied "I have no idea, I vent a lot of anger online. Some of these are random". There is no doubt that this highly offensive public post was intended to be read by other people. I do not accept that Mr Wong did not know who he was intending to address this to. He quite specifically refers to people who knew who they were and, when taken in conjunction with the other posts that he

subsequently wrote, which I discuss below, it is reasonable to infer that this was part of a campaign of intimidation against former colleagues at Royal Mail.

13. Mrs McDonald is employed by Royal Mail as the Delivery Office Manager Support at the Spennymoor Delivery Office. She has worked there since 1996 and has occupied the role since 1999. She has known Mr Wong since he joined the business.
14. Mrs McDonald states that she suffers from a condition called Polycystic Ovary Syndrome, which results in her hair thinning at the front and also from weight gain. I have no reason to doubt this. It is also reasonable to infer that Mr Wong knew about her condition given that they had worked together for many years and that the nature of her condition would be obvious to him.
15. Mrs McDonald knew that Mr Wong had been dismissed but she had no involvement with his dismissal other than being interviewed as part of the conduct investigation. She has also been asked to be a witness at the Final Hearing.
16. Mrs McDonald first became aware of Mr Wong's claims when several of her colleagues told her that he had approached them to be witnesses and that he had made allegations against her including race discrimination. She denies those allegations.
17. On 27 January 2022, Mrs McDonald was in the Asda which is near to the Spennymoor Delivery Office. She says that while she was at the self-service scan checkouts, she saw Mr Wong. She says that he became abusive and aggressive towards her and told her that she was a fat liar and blamed her for losing his job. Under cross examination, whilst Mr Wong acknowledged that he had encountered Mrs McDonald at the store, he denied being aggressive or abusing her. He suggests that it was her who was aggressive towards him. This is contested evidence and I am unable to find who instigated the interaction. However, it clearly upset Mrs McDonald because of what she did next, and I think it is reasonable to infer that Mr Wong was abusive and aggressive towards her as she claims.
18. Mrs McDonald says that after the encounter with Mr Wong, she left the store and headed back to the office. She walked down a public footpath and when she reached the other end which was near to the bus station, Mr Wong was there in his partner's car driving alongside her, which she found very intimidating. She took a photograph. This evidence is consistent with there being an altercation at the store. I am prepared to accept what Mrs McDonald says.
19. Mrs McDonald states that once she got back to the office, she asked her colleague if they could still see Mr Wong in his partner's car outside. The colleague confirmed that they could at which point, Mr Wong proceeded to do a U-turn and drove off. This evidence is consistent with there being an altercation at the store. I am prepared to accept what Mrs McDonald says.
20. Mrs McDonald felt threatened by the incident, and she contacted the police. I have no reason to doubt what she is saying.

21. On 29 March 2022, Mr Wong posted on Facebook under the name "VICTIM at Royal Mail" [43] as follows:

worked with a bunch of nepotistic, narcissistic, money & power hungry lying CUNTS!!!!!!

Mr Wong confirmed that he had posted this. He told me that the post was directed at all of his colleagues and that he vented a lot of anger online. This post is, by any measure, offensive. Furthermore, the use of the "C" word is capitalized to emphasise anger. It is immoderate and intemperate language and is clearly directed against former colleagues at Royal Mail on a public facing page. It must have been intended to cause them offence.

22. On 28 April 2022, Mrs McDonald attended her GP surgery which is near to the office. She needed to pick something up for her husband. She says that as she was crossing the road, she noticed Mr Wong was there. She alleges that he became aggressive and abusive and shouted at her that her family were "going to get it". She then goes on to say that Mr Wong started talking about algorithms and that he knew that she had lied during the conduct investigation. She replied that she did not know what algorithms were and he responded by saying that she was thick and that she should Google it [i.e. conduct a search on the Internet]. She also says that he alleged that he had a transcript proving that it was her fault that he had lost his job, but she would not understand what a transcript was because she was "thick as fuck" and that she did not understand any words with more than two syllables.

23. Under cross-examination, Mr Wong denied the altercation that is alleged to have taken place on 28 April 2022. He said that he could not recall speaking to her about algorithms. This suggests that there was an encounter between the two people on that day and he may have discussed algorithms. When he was asked about her allegation that she was thick and should Google what was meant by algorithms he started laughing and said Mrs McDonald was a compulsive liar, even when her lips moved, and he had known her for 18 years. I accept Mrs McDonald's version of events.

24. Mrs McDonald reported the GP surgery incident to the police.

25. On 5 May 2022, Mr Wong posted the following on his Facebook page [45]:

ALGORITHMS ??????... YOU NOSEY FOLICALLY CHALLENGED OBESE CUNT!!!! YOU KNOW WHOM YOU ARE

Once again, Mr Wong was using very offensive language on a public forum which he clearly intended to be read by others. The issue is to whom was this post directed. When I asked Mr Wong what he meant by the word algorithms he replied that it was something that he picked up online and thought it meant "when the phone is always listening". That is not an algorithm. When I asked what he meant by someone who was a "folically challenged obese cunt" he replied, "I was focused on true crime stuff, Linda Fairstein, she was an assistant district attorney in America". He suggested that this woman who was on a true crime television show that he had watched was the person to whom the post was addressed. He admitted that he felt bitter and angry about certain things relating to his dismissal and that people did not listen to him. I believe that the intended recipient of this post was Mrs McDonald for the

following reasons. “Folically challenged” is a euphemism for someone who is bald or suffers from hair loss. Obese is a synonym for being fat. Mr Wong knew or ought to have known that Mrs McDonald suffered from hair loss and struggled with weight gain problems because of her condition given that he had worked with her for many years. He would have seen this. On his own admission, he was angry about being dismissed and he was venting his anger. This post abundantly illustrates his anger. I also believe that there may have been a discussion about algorithms during the encounter 28 April 2022 which was only a few days earlier than this post which was being pursued in this post. The reference to Linda Fairstein was made up and is completely implausible given the context of his obvious anger with his former colleagues including Mrs McDonald. It is pure fabrication and damages Mr Wong’s credibility.

26. There is an undated Facebook post [46]. In this post, Mr Wong is replying to a comment made by somebody called Donna which reads as follows:

Donna [] little man syndrome kicking in again... a little inadvertent message for a certain individual who seems to be living in the curtain twitching days of snooping & is too thick (mainly around the midsection a.k.a. Michelin woman) to realise we're technically advanced these days and such things as algorithms flag shit up xx

Mr Wong told me that this post was addressed to the same woman [i.e. Linda Fairstein]. I disagree, I believe the post was addressed to Mrs McDonald for the reasons that I have already given. This is highly likely given the reference to “Michelin woman” because it is a matter of public knowledge that this is a play on the image of the “Michelin Man” which is the official mascot of the Michelin Tyre Company. It is a humanoid figure consisting of stacked white tyres. In popular culture, an alternative meaning for referring to someone looking like the Michelin Man is to say they are obese, and it is intended to be insulting. It is significant that Mr Wong changes the gender and refers to Michelin woman to make the point. Once again this was a public post and was intended to be read or could be read by members of the public, including Mrs McDonald and Mr Wong’s former colleagues at the Royal Mail.

27. Mr Wong made another post on his Facebook page as follows [47]:

Deborah [] ok ok but can i at least piss on her grave when she snuffs it?

Once again, Mr Wong told me that he was referring to Linda Fairstein. For the reasons that I have already given, I do not believe him. I think the intended recipient of this post was Mrs McDonald. The post is offensive and intimidating. It shows great disrespect.

28. On 2 June 2022, Mr Wong posted the following on his Facebook page [50]:

Hey U CUNT!! Yes out of the 7,868,872, 451 people in this world this message is just for you! I did mention algorithms & nepotism etc (look them up in the dictionary) I was just thinking instead of being a nosey fucker & possessing why don't you put you're efforts & you're oh so precious ill gotten gains & gained from manipulation of the pay docket (fraud & obviously a legal) amongst other things into maybe buying a

*personality, a life oh or maybe a gastric band ahhh a hair transplant?
So I know you'll be reading this soon & if so forward the safe word on
in passing...The safe word being let's see KOJAK!!! Wink*

29. This post is very offensive. Whilst Mr Wong understood the meaning of the word nepotism, he told me that he did not know who the term was directed at. He was deflecting from the obvious conclusion that the intended recipient was Mrs McDonald and former colleagues at Royal Mail. I say this for the following reasons. He has used the word nepotism twice in his particulars of claim (see above). He was alleging that he was the victim of a clique at the Royal Mail. It is entirely disingenuous of him to say that he did not know who the recipient was because in the post, he continues by making reference to the recipient requiring a gastric band. It is common knowledge that people who are morbidly obese undergo gastric surgery to be fitted with a gastric band to restrict the amount of food that they can ingest thereby helping them to lose a significant amount of weight. Mr Wong knew that Mrs McDonald had weight problems because of her condition. He would have seen this when working with her. He also knew that she suffered from hair loss because of her condition; he would have seen that too. I believe that this post specifically targets her by making reference to the need to have a hair transplant and also to Kojak. It is common knowledge that Kojak was a character in a 1970s American crime thriller series played by the late Telly Savalas. Mr Savalas was bald. His baldness was key to his character in the series. Furthermore, in her witness statement, Mrs McDonald states that this message referred to her because of the previous interactions and posts and also because only she and the Delivery Office Manager had access to pay dockets. I have no reason to doubt what she is saying.

30. The bundle includes a Royal Mail Parcel Collect leaflet [42]. The following words have been handwritten onto the leaflet:

HA HA! With all due respect go fuck yourselves! especially that obese balding cunt

In her witness statement, Mrs McDonald says that on 17 June 2022, she was made aware by the OPG delivering mail to Mr Wong's address that a door-to-door item advertising the parcel collection service had been posted which had been hung on Mr Wong's front door with the offending words written thereon. Mr Wong told me that he did not know who had written those words or to whom they referred. Given my concerns about his general credibility and the consistency of other the targeted comments that he made on his Facebook posts, I think it is reasonable to conclude that he knew very well who wrote those words and to whom they were directed. He wrote those words and they were directed against Mrs McDonald. What he wrote on that leaflet is very offensive.

31. Mr Wong has prosecuted a campaign of intimidation against Mrs McDonald both through personal interactions with her at the Asda store and at her GP's surgery as well as following her in a car and also through his online behaviour and by defacing a Royal Mail leaflet. Indeed she felt it necessary to report his behaviour to the police. It was abusive, aggressive, and threatening. How has

this affected Mrs McDonald? I think this is best expressed in her own words taken from her witness statement:

25. I find the comments the Claimant has made extremely hurtful and offensive and I also feel threatened and intimidated by these messages and the interactions I have had with the Claimant and worried for my safety and that of my family.

26. Since these incidents have occurred I have visited my doctor and been put on Sertraline (anti-depressant) tablets, first on 50 mg then put up to 100 mg due to the severity of my stress. I rarely go to the shops in the town around the office as I am afraid of bumping into him and I no longer socialise in the town for fear of an altercation with him, especially as my husband has heart problems. After two heart attacks so he is under strict medical advice not to get stressed and anyway so any arguments or altercations could be lethal to him.

27. We have also had CCTV installed at the front of our home along with my parents' and sister's homes in fear of him coming damaging our property as threatened by him in our last altercation.

28. My self-esteem is at an all-time low after his hurtful comments about my weight and my hair and I regularly feel upset because of this. I feel the need to hide the severity of these comments from my husband as with his heart condition he should not get upset or anxious in any way as anyone reading these comments about one of their loved ones obviously would because of how nasty they are, so I try to keep it to myself which is hard when the comments are so hurtful.

I have no reason to doubt what Mrs McDonald says about how Mr Wong's appalling behaviour has affected her.

The applicable law

32. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike at out a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part).

33. A claim or response (or part) can be struck out on the following grounds:

- a. That it is scandalous or vexatious or has no reasonable prospect of success — rule 37(1)(a).
- 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 — rule 37(1)(b).
- c. For non-compliance with any of the tribunal rules or with an order of the tribunal — rule 37(1)(c).
- d. That it has not been actively pursued — rule 37(1)(d).

- 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) — rule 37(1)(e).

Royal Mail relies on rules 37(1)(b) and (d).

- 34. The word “scandalous” in the context of rule 37 (1) (b) means irrelevant and abusive of the other side. It is not to be given its colloquial meaning of signifying something that is “shocking” (**Bennett v Sub London Borough Council 2002 ICR 881, CA**). In the case of **Jones v Wallop Industries 17182/81** J claimed that he had been unfairly selected for redundancy and, to back up his claim, alleged fraud, mismanagement, misrepresentation, criminal conspiracy, intimidation and “other torts” against the employer. The Tribunal found that J was “hellbent on causing the respondent company and a number of individuals as much inconvenience, distress, embarrassment and expense as possible” and ordered that the whole claim should be struck out as being largely scandalous or vexatious.
- 35. A “vexatious” claim has been described as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive.
- 36. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable, or vexatious conduct, the Tribunal must consider whether a fair trial as possible. In **De Keyser Ltd v Wilson IRLR 324, EAT** I am reminded that the EAT made it clear that certain conduct, such as the deliberate flouting of a Tribunal order, can lead directly to the question of striking out order. However, in ordinary circumstances, neither a claim nor defence can be struck out on the basis of a party’s conduct unless the conclusion is reached that a fair trial is no longer possible. In **Bolch v Chipman 2004 IRLR 140, EAT**, the EAT set out the steps that a Tribunal must ordinarily take when determining whether to make a strike out order as follows:
 - a. Before making a strike out order under rule 37 (b) the Employment Judge must find that a party or their representative has behaved scandalously, unreasonably, or vexatiously when conducting the proceedings.
 - b. One such a finding has been made, they must consider in accordance with **De Keyser** whether a fair trial is still possible, as, save in exceptional circumstances, a strike out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.
 - c. Even if a fair trial is unachievable, the Tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out their claim or response.

37. In **Emuemukoro v Croma Vigilant (Scotland) Ltd and Ors 2022 ICR 327**, the EAT rejected the proposition that the question of whether a fair trial is possible must be determined in absolute terms; that is to say, by considering whether a fair trial is possible at all, not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. CV Ltd had failed to comply with any of the tribunal's case management orders that had been made in preparation for the hearing. E had made an application for the response to be struck out for that reason, but it had not been practicable to deal with that application in advance of the hearing. The strike-out application was renewed on the first morning of what was scheduled to be a five-day hearing. The strike-out order was granted by the tribunal, which found that it was no longer possible for a fair trial to proceed. It was not feasible to remedy the deficiencies in the time available, and an adjournment, which would have been for many months due to the tribunal's backlog of cases, would have caused E prejudice owing to the two-year delay since dismissal and the fact that E's considerable losses continued to grow substantially from week to week. CV Ltd appealed against the strike-out decision to the EAT, which rejected the appeal. It held that there was nothing in any of the authorities to indicate that the question of whether a fair trial is possible must be determined in absolute terms. The EAT considered that, where a party's unreasonable conduct has resulted in a fair trial not being possible within that the allocated window, the power to strike-out is triggered. Whether the power ought to be exercised depends on whether it is proportionate to do so. The EAT found no error in the tribunal's approach to proportionality. Striking out was considered to be the least drastic course to take in this case. It was a highly relevant factor that the strike-out application was being considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in that hearing window. There was no other option other than an adjournment, which would have resulted in unacceptable prejudice to E (a conclusion that was not challenged by CV Ltd). The EAT therefore concluded that the tribunal had not erred in striking out the response.
38. In **Gainford Care Homes Ltd v Tipple and anor 2016 EWCA Civ 382, CA** the Tribunal struck out the respondent's response and debarred it from taking any further part in the proceedings in circumstances where two of its members had verbally and physically intimidated claimant who was also acting as a witness in another claimant's case. GCH Ltd, a family company, was managed by MK, his wife, SM, and their son, IK. T and R, both former employees, brought claims against GCH Ltd for unfair dismissal and discrimination. Are supported T's case and was due to act as a witness. At the Tribunal premises MK verbally threatened R to induce her to withdraw her support for T. She was also subjected to physical intimidation by IK who intentionally drove his car at speed close to her as she was using a zebra crossing in the car park outside the Tribunal building.
39. The Tribunal decided that GCH Ltd should be barred from taking any further part in the proceedings, whether in relation to liability or remedies, in both claims. Both acts of intimidation were so closely associated with the proceedings that they formed part of the manner in which they had been

conducted by or on behalf of GCH Ltd. Also, the second act, set in the context of the first, amounted to scandalous and unreasonable conduct. The Tribunal recognised that it was an extreme and draconian step to strike out GCH Ltd.'s response but it was a consequence brought upon by GCH Ltd itself. The Tribunal also carefully considered whether there was some alternative response short of barring GCH Ltd, in particular GCH Ltd.'s suggestion that it could invite the two individuals responsible for the acts not to attend or give evidence. However, it did not think that this would address the ability to have a fair trial in all the circumstances, nor that it was proportionate to deal with the prejudice to the wronged party. Permission to appeal against the substance of the tribunal's decision was subsequently refused by the EAT. The question of whether the tribunal had given sufficient reasons for its decision to debar GCH Ltd was pursued to the Court of Appeal, which concluded that it had.

40. Intimidation of witnesses does not automatically mean that a fair trial is no longer possible. In **A v B EATS 0042/19** the claimant, a litigant in person, had sent strongly worded and abusive correspondence to the respondent's representative and witnesses. One of the witnesses, C, was a senior married colleague with whom the claimant had had an affair during her employment with the respondent. Initially the Tribunal sought to address the claimant's conduct through 'robust case management' and made orders that she should immediately desist from repeating allegations previously made in correspondence, should correspond professionally and politely with the respondent's representative, and should not contact or attempt to contact any witnesses until a witness list had been agreed. The claimant subsequently sent two further emails to C, informing him (among other things) that she had decided to add C's wife as a witness and was contemplating adding his sister and mother. The Tribunal subsequently struck out her claims on the grounds that the emails were intimidatory, and thus constituted 'scandalous, unreasonable or vexatious' conduct under rule 37(1)(b), and were sent in breach of Tribunal orders, falling foul of rule 37(1)(c). The EAT observed that witness intimidation is an obvious example of 'scandalous, unreasonable or vexatious' conduct in that it tends to subvert the process of justice and has the potential to impair the fairness of the trial. However, even if the claimant's emails to C could be said to be intimidatory, in the sense that they were intended to prevent him from giving evidence, the EAT considered that the tribunal had erred in law in failing to address the question of whether strike-out under rule 37(1)(b) was necessary because a fair trial was no longer possible. In the instant case, the Tribunal was in a position to prevent the claimant misusing its procedures by refusing to allow her to lead irrelevant witnesses and by preventing her from asking C questions that were not relevant to the case. There was therefore no imminent risk to the fairness of the hearing. Nevertheless, the tribunal had been entitled to strike out the claims under rule 37(1)(c) for non-compliance with tribunal orders. That non-compliance was sufficiently serious to justify strike-out since the tribunal could have no confidence that the claimant would act with appropriate restraint in her future correspondence or at the hearing itself.

41. The question of proportionality is determined according to the same principles as adumbrated in **Blockbuster Entertainment**.
42. Striking out a claim under rule 37 (1) (d) follows the principles set out in the case of **Birkett v James 1978 AC 297, HL** as applied by the Court of Appeal in **Evans and anor v Commissioner of Police of the Metropolis 1993 ICR 151, CA**. Accordingly, the Tribunal can strike out a claim where:
- f. there has been delay that is intentional or contumelious (disrespectful or abusive to the court); or
 - g. there has been inordinate or inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.
43. The first category is likely to include cases where the claimant has failed to adhere to an order of the Tribunal. Consequently, it overlaps substantially with the Tribunal's powers under rule 37 (1) (c). The second category requires not only that there has been a delay of an inordinate or inexcusable kind, but that the respondent can show that it will suffer some prejudice as a result. In **Evans** the EAT held that although striking out a claim on the basis of a claimant's failure actively to pursue is a Draconian measure, it is one that can be ordered where the claimant's default is intentional and shows disrespect for the Tribunal and/or its procedures. Overall, the EAT felt that the claimant had shown considerable disrespect to the Tribunal and its procedures, and to the respondent's interests.

Discussion and conclusions

44. In his written representations, Mr Chaudhury narrates the chronology of Mr Wong's behaviour towards Mrs McDonald and submits that Royal Mail has the right to call its witnesses who should be free from intimidation. He further submits that the Royal Mail's defence of the claims will be severely weakened if Mrs McDonald does not give evidence. This is because in her evidence, she speaks to the investigation which led to instigating disciplinary proceedings against Mr Wong. Furthermore, the decision-makers in relation to the dismissal have confirmed that they are concerned about Mrs McDonald's treatment, and they have indicated that they are reluctant to participate in the Final Hearing because they could be targeted by Mr Wong for abuse. Royal Mail owes its employees a duty of care and is unwilling to subject them to Mr Wong who has already demonstrated the capacity to direct abuse. Mr Chaudhury submits that Mr Wong has confirmed that he lives in close proximity to the delivery office and there are, accordingly, concerns for Mrs McDonald and other witnesses' safety.
45. In his written submissions, Mr Chaudhury also submits that Mr Wong has not actively pursued his case and has failed to comply with the Tribunal's request for comments by 30 June 2022. He acknowledges that Mr Wong responded to the Tribunal's second request on 12 August 2022. However, Royal Mail are

concerned that Mr Wong will not provide a witness statement which will jeopardise the hearing listed for 1 November 2022.

46. In his oral submissions, Mr Choudhury emphasised that the online postings were thematic and were directed against Mrs McDonald and her physical appearance. They were intended for her consumption, and he knew what he was doing. He intended to cause her distress, humiliation and to intimidate her. He had applied pressure by way of comments on social media in the belief that he could do so with impunity.

47. Mr Wong submitted that Mrs McDonald was a compulsive liar. He said that the majority of the things that she had alleged about the Asda and the other incident in the GP surgery were lies. He simply denied the allegations. He said that the police had not come to him about any complaints. He went on to say:

she portrays herself as the victim by getting sympathy about her appearance blah, blah, blah and her antidepressant prescription. I am on more sertraline and she is. At the end of the day I have not come across good and I have not been given an opportunity to dissect her lies. Her storytelling today was better than mine. I know where it is going and I look forward to receiving your letter. If I get to the November final hearing, I would win. It has got to go. Over the last 18 years I had an exemplary record. They wanted to get rid of me. It was a witchhunt. As for my views on the judicial system, I will just leave it at that.

48. I have decided to strike out Mr Wong's claims under rule 37 (1) (b) for the following reasons. Whilst I accept that it is draconian to strike out claims, I believe it is proportionate to do so in this case. Mr Wong's behaviour towards Mrs McDonald and former colleagues has been appalling and very offensive. She is quite entitled to feel frightened and threatened by his behaviour and I entirely understand why she would be reluctant or simply refuse to give evidence at the Final Hearing. She has been sufficiently concerned about Mr Wong's behaviour that she went to the police. I also accept that other witnesses involved in the disciplinary process are scared about the prospect of giving evidence as detailed by Mr Choudhury in his written representations. Furthermore, Royal Mail have a duty of care towards their employees. I do not believe that a lesser remedy would be effective in this case as I think that Mr Wong would not comply with any order. We are at the stage where a Final Hearing is imminent, and the parties are not ready to proceed.

49. This is a case of witness intimidation. As the case law illustrates, witness intimidation is an obvious example of 'scandalous, unreasonable or vexatious' conduct in that it tends to subvert the process of justice and has the potential to impair the fairness of the trial. In my opinion, this is a clear case where the fairness of the trial will be impaired because of Mr Wong's behaviour towards Mrs McDonald. Royal Mail will be deprived of the benefit of Mrs McDonald's evidence and, possibly the evidence of other key witnesses.

50. For the sake of completeness, I would not have been minded striking out the claim under rule 37 1 (d) given that both sides did not exchange witness statements on the date as required.

Employment Judge Green

Date 5 October 2022