Case No: 1601790/20

EMPLOYMENT TRIBUNALS

Claimant: Mr D Egan

Respondent: Hywel Dda University Health Board

Heard at: Cardiff (on the papers) **On:** 2 December 2022

Before: Employment Judge C Sharp
(sitting alone)

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's application for a strike out of the Response is unsuccessful;

2. The Respondent's application for the costs incurred in connection with the Claimant's unsuccessful application is unsuccessful.

REASONS

1. The Claimant was formerly employed by the Respondent and brought several claims to the Tribunal. Following a preliminary hearing, he was found by Employment Judge G Duncan to have been a worker, not an employee of the Respondent, which affected the claims he wished to bring. At the current time, the Claimant has an unauthorised deduction from wages claim that will be separately struck out by me (the Claimant not having responded to a strike out warning), and a detriment following the making of alleged protected disclosures claim before the Tribunal. The protected disclosure claim is due to be listed for a final hearing.

2. The Claimant on 7 November 2022 made an application to the Tribunal that the Response of the Respondent should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure. He sent a substantial document setting out the basis of his application and attached various documents. In essence, the Claimant is asserting that at the preliminary hearing before Judge Duncan, the Respondent and its legal representative perverted the course of justice and its witnesses committed perjury, and that the Respondent lied in its Response.

3. The Claimant sought a hearing in person for his application. The Respondent's comments on the application were sought, and it provided written submissions (together with an application for its costs of doing so), confirming that it was content for the matter to be considered on the papers.

4. The Claimant was given an opportunity to respond, and did so promptly. He remained of the view that he wanted a hearing in person.

5. I have determined that a hearing in person would not be in accordance with the over-riding objective and is not required under Rule 37. The over-riding objective requires tribunals to deal with matters efficiently and proportionately and with a view to saving expense and costs. This does not excuse conducting matters unfairly, but the parties have been given a reasonable opportunity to respond. The Claimant has said all that he reasonably could wish to say in support of his application on two occasions.

6. Further, Rule 37 says "*(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.*" It is the party whose case may be struck out who can require a hearing in person, not the party seeking the striking out. The Respondent does not require a hearing. The Claimant has given no good reason why a hearing is required.

7. Consequently, I have determined that it is fair and proportionate to deal with the application to strike out the response on the papers.

Application to strike out response

8. The Claimant has sought a strike out of the Response, asserting that the Respondent's conduct has been criminal, that it has intentionally deceived the Tribunal and abused its process through making an untrue defence. The Claimant has not precisely identified which sub-section of Rule 37 he relies upon, but says it would be cruel to allow the proceedings to continue and does refer to scandalous and unreasonable behaviour by the Respondent. However, the Claimant also mentions that he feels the Respondent "*does not have the proverbial leg to stand on",* which could be seen as a submission that the Respondent's case has no reasonable prospect of success. Indeed later in his submission, he analyses why he should win his claim.

9. The Claimant goes on to assert that a witness at the Duncan Tribunal committed perjury and perverted the course of justice, and that the legal representative for the Respondent is also perverting the course of justice. He also seeks the involvement of the Crown Prosecution Service. The Claimant complains about the decision of Judge Duncan and his conduct of the preliminary hearing and that the Respondent has a "*disproportionate influence on the Judgment of the Wales Employment Tribunal*". He adds that Counsel at the Duncan preliminary hearing is a fee-paid Employment Judge in another region and implies that this may be relevant to the treatment he perceived himself to have received from the Tribunal.

10. The Respondent provided written submissions in response. It focused on the allegation of scandalous behaviour and reminded the Tribunal of the relevant legal principles emanating from Bolch v Chipman [2004] IRLR 140 and

Bennett v London Borough of Southwark [2002] IRLR 407. It commented that the Claimant's application was the latest example of wholly unreasonable and/or vexatious behaviour on his part, and was without merit. The Respondent noted that I in a preliminary hearing on 22 September 2022 set out the issues on which the parties needed to call evidence; the case is to be heard at a final hearing where the evidence will be tested.

11. The Claimant was given a further opportunity to respond. He did so, and said that he felt the Respondent was making scandalous assertions about him. The Claimant remained adamant that his claim would succeed and there was no cogent defence. He described the Respondent as "*hostile, themselves intimidators and simply have no cogent grasp on a case that they have let run wildly out of control purely due to the fact that they hijacked a case through lies and deceit*."

12. Having considered the submissions of the parties, I refuse the Claimant's application to strike out the Response. First, it is important to explain that even if a response is struck out, it does not mean the Claimant would win. Given the nature of the claim (protected disclosure), the Tribunal would be likely to require the Claimant to prove his case and establish that there was a protected disclosure(s), detriment(s), and that the treatment complained of was materially influenced by the making of a protected disclosure. The Respondent could still be permitted to take part in the proceedings by the hearing panel.

13. In any event, the Claimant has asserted at length that his case will succeed, but as was made clear to him in September 2022, it will require evidence to be considered and findings of fact to be made. If the Respondent has provided an untrue defence, then it is for the Claimant to establish that at a final hearing and inferences could then be drawn by the Tribunal that assist his case. Costs consequences may flow. For the Tribunal to find that the defence is untrue, it must be dealt with at a final hearing on the basis of evidence and argument, not on the basis of assertion. The case law, which I will not go through in detail as I do not consider it proportionate, is well settled; to strike out a claim (or a response) of this nature on the grounds of no reasonable prospects of success is exceptional. Cox v Adecco and others 2021 ICR 1307 sets out some useful general relevant propositions:

    (a) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
    (b) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
    (c) The case of the party to be struck out must ordinarily be taken at its highest;
    (d) It is necessary to consider, in reasonable detail, what the claims and issues are.

14. Turing to the Claimant's assertions of scandalous or unreasonable behaviour by the Respondent and his complaints about the Duncan tribunal, I can deal with these simply. The Claimant has provided no evidence (other than his opinion and arguments) of such behaviour. The Claimant has unsuccessfully sought a reconsideration of the Duncan judgment and been told how to appeal. I must proceed on the basis that the Judgment is correct unless a

senior court allows the Claimant's appeal. I made this plain to the Claimant in September. This means that I am in no position to find a witness in the Duncan Tribunal has lied at this time; the final tribunal may be better placed to do so depending on the evidence. A preliminary hearing is not the forum to determine if a witness in an earlier hearing has lied or if criminal offences have been committed; these are either matters for the final hearing, irrelevant or for other jurisdictions to determine. In any event, the employment tribunal does not give the Crown Prosecution Service referrals; the Claimant's submissions on this are misconceived.

15. The fact that the Respondent's legal representatives are defending litigation on their client's instructions is not evidence of any scandalous behaviour on their part. The fact that the Respondent's Counsel is a fee-paid employment judge in another region is irrelevant. There is no evidence that this region is unduly influenced by the Respondent. Judgments are available publicly; there is no analysis shown to me that supports a view that the Respondent or its Counsel are unusually successful.

16. Even taking the Claimant's application at its highest, he has not shown that the Respondent's Response does not have a reasonable prospect of success or that its conduct of proceedings is scandalous or unreasonable. It is, as the Respondent submitted, a hopeless application.

17. The Respondent has not made an application that the Claimant's claims are struck out due to his conduct; as the threshold is high to do so (as shown by the case law it cites), this is understandable.

18. The case will therefore continue as I have previously directed. The parties are expected to focus on preparing for the final hearing, and not on matters that do not assist the process. There is no short-circuit to a final hearing.

Application for costs made by the Respondent

19. The issues before the Tribunal on this issue are three-fold:

    a. Has the Claimant in making his application to strike out the Response, and in particular his assertions about the Respondent's witness and legal representative, acted in such a way that he has acted vexatiously, abusively or otherwise unreasonably?
    b. If so, how should the Tribunal exercise its discretion in deciding whether to make a costs order against the Claimant?
    c. If it does decide to make a costs order, how much should the Claimant be directed to pay?

20. The common meaning of the words "*abusive*" and "*unreasonable*" apply to this application; the test is not whether the impact of the conduct on the Respondent was unreasonable, and abuse may mean gratuitous rudeness or a misuse of tribunal proceedings. AG v Barker [2000] 1 FLR 759 in contrast points out that the hallmark of a vexatious proceeding is that it has little or no basis in law and the effect is to subject the Respondent to inconvenience, harassment and expense out of all proportion to any likely gain (and so is an abuse of the process of the Tribunal).

21. Rule 76 states:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …"

22. The vexatious, abusive and/or unreasonable behaviour complained of by the Respondent is:

a) the alleged bringing of a hopeless application; and
b) the motive for making the application is vexatious, abusive or unreasonable (the Respondent says the Claimant is attempting to intimidate a witness and legal representative through his allegations) and/or the manner in which the application is framed is vexatious, abusive or unreasonable.

23. The Claimant's response was to deny any attempt to intimidate and to say that there was no evidence to support the Respondent's contentions. He reiterated that his claim was so strong, the Respondent's defence was bound to fail. The Claimant added that the making of any costs order would be a serious breach of his Article 6 rights (the right to a fair trial), as well as Article 9 (freedom of thought, conscience or religion), Article 10 (freedom of expression) and Article 14 (the right not to be discriminated against), and arguably degrading treatment. The Claimant dwelled on his views of the matter, but they do not assist the Tribunal and are not summarised.

24. I reminded myself that the Claimant is not represented, whether legally or otherwise, though he has been given details of sources of advice by the Tribunal. A litigant in person should be judged less harshly for their conduct (AQ Ltd v Holden 2012 IRLR 648). Litigants in person are likely to lack objectivity and knowledge of law and practice; while the Claimant in this case has cited lots of law and cases, they are frequently irrelevant or from a different arena. For example, Article 9 is not engaged in this case and Article 10 is not unfettered – no-one has the right to say what they like, even in court proceedings, without consequence. The Claimant in my view is lacking objectivity and has made many sweeping statements and allegations without a proper objective or evidential foundation; the Claimant is adamant that his claim will succeed – it is for him to prove his case at the final hearing. That said, a litigant in person can be found to have behaved vexatiously, abusively or unreasonably.

25. The Claimant's application in my view was without merit. If he had sought advice on it, I consider it likely that he would have been strongly advised not to make it. The terms in which the Claimant has phrased his application further compounds the issue. He has not only used abusive terms about the Respondent (which could be forgiven in a litigant in person in referring to his former employer), but has done so about third parties carrying out their professional tasks. Very serious accusations have been made about various persons, which have no evidential foundation on the basis of what the Claimant has provided. The Claimant is a professional person but has repeatedly made comments and sent emails to the Tribunal that are not in professional terms, including allegations against the Tribunal itself in relation

to his application. It is not proportionate for me to set out every instance. I acknowledge that the Claimant may simply get carried away when writing as in person I have found him to be scrupulously polite to me; his correspondence speaks for itself. However, he has repeatedly accused the Respondent and others of criminal behaviour and says he has shared this with a wider audience, that particular individuals are liars and capricious, and that judges in this region have conducted themselves in such a way that *"justice in the Welsh Employment Arena is dead."*. It could be reasonably said that the Claimant is not helping himself by making applications in such a manner.

26. I do not though consider that the Claimant's intention is to abuse the process of the Tribunal or be vexatious. I consider that it is more likely than not that he genuinely believes his claim is so strong that it is unfair to expect him to attend a final hearing and go through the Tribunal process. This is the view I have formed from his correspondence to the Tribunal. I do not consider the effect of one single application without merit on the Respondent to be of a level to be vexatious; it was dealt with swiftly by Counsel on the papers. While the allegations about the legal representatives are not pleasant, part of the role of the legal professional (and the judge) is to have broad shoulders and to shrug off unsubstantiated allegations about their conduct.

27. Taking everything into account, I do not consider that the Claimant's conduct in making the application to strike out the Response is unreasonable or vexatious. It is closer to abusive, both in terms of the resources of the Respondent and the Tribunal in having to deal with the matter and in terms of how the Claimant chooses to make such serious allegations without objective supportive evidence, but I do not consider that he has quite reached the threshold to meet the requirements of Rule 76. The Claimant, if he continues to represent himself, must endeavour to find some objectivity and focus on following the process to prove his case, and cease making unsubstantiated allegations against others. If the Claimant continues to act in such a way, he may find himself in breach of Rule 76 or even having his claim struck out if a fair trial is no longer possible due to his conduct.

Employment Judge C Sharp
Dated: 2 December 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....5 December 2022.....

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FOR EMPLOYMENT TRIBUNALS