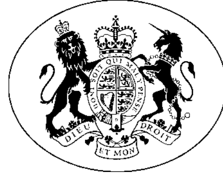

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Deans**

Respondent: **(1) RBL Law Limited**
(2) Nicola Foulston
(3) Ian Rosenblatt
(4) Anthony Field

OPEN PRELIMINARY HEARING

Heard at: **London Central (by CVP)** **On: 20 January 2023**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **Mr C Rajgopaul**
For the Respondent: **Mr R Lieper KC**

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Claimant's complaints are not struck out.

Issues for Open Preliminary Hearing

(1) This Open Preliminary Hearing had been listed to determine the following:

(i) whether the Claimant's case should be struck out;

(ii) an amendment application by the Claimant; and

(iii) appropriate case management as appropriate, including ordering an amendment to the Respondent's Grounds of Resistance, if necessary.

The Background

(2) By a claim form presented on 28th February 2020, the Claimant brought complaints of: (a) unfair dismissal; (b) race discrimination; (c) that he was owed

notice pay; (d) that he is owed “other payments”; (e) another type of claim which the Employment Tribunal can deal with: (i) whistleblowing; (ii) victimisation; (iii) harassment; and (iv) failure to provide a safe place of work.

(3) The Claimant had been employed by the First Respondent, a full service law firm, from 8 May 2017. At the point his employment ended, the Claimant contends that he was employed as a solicitor and Head of Employment. He says that his employment ended on 21st February 2020.

(4) R2 is the CEO of RBL Law. R3 is the founder and Senior Partner of RBL Law. R4 is a Director and the Compliance Officer of RBL Law.

(5) The Claimant relies on being black in his race discrimination claim.

(6) The Respondents defended the claim by an ET3 dated 31 March 2020. They contended the Claimant was employed as a Partner in the Employment Team, and that they accepted his repudiatory breach of contract on 24th February 2022. They accepted the Claimant was an employee; They denied the Claimant was constructively dismissed and that he was subject to detriments or discrimination; They contended that the Claimant’s dismissal was fair for a reason that related to the capability of the Claimant.

(7) The Claimant had made an application for interim relief against R1. This was heard on 22 April 2020. Judgment in favour of R1 was given on 21 May 2020.

(8) On 4 June 2020 the Respondents filed Amended Grounds of Resistance and made a Request for Further and Better Particulars and R1 made an application for costs.

(9) The Respondents admit in their Amended Grounds of Resistance that: (i) R2 used at a dinner (in front of the Claimant) the phrase “nigger in the woodpile” (§55(b)); and (ii) (following the Claimant alleging that he had suffered race discrimination in his resignation letter) R3 said to the Claimant that he was “just a fucking anti-Semite” and then raised a grievance against the Claimant because R3 thought that the Claimant’s “suggestion that he was racist was untrue” (§48 and 49).

(10) On 9 June 2020 the Claimant responded to the costs application, setting out his position. R1 replied on 10 June 2020.

(11) The case and the various applications progressed no further until 7 October 2022, when, following a change in representation, the Claimant’s newly instructed solicitors came on the record. The Claimant made an application for a case management hearing at the same time.

(12) On 10 October 2022, the Tribunal notified the parties that a PH would take place on 28 October 2022.

(13) On 20 and 21 October 2022, the Claimant provided the Rs with an Agenda, Bundle Index and draft List of Issues in advance of the PH.

(14) On 26 October 2022 the Respondents' solicitors then wrote to the tribunal applying to strike out the Claimant's claim.

(15) On 28 October the Claimant provided the Respondents with draft particulars of Amended Grounds of Claim, shortly before the hearing was to commence. There was no accompanying application to amend.

(16) At the Preliminary Hearing on 28 October 2022 EJ Salter ordered that, by 11th November 2022 the Claimant, if so advised, should formally apply to amend his claim in line with draft amended particulars of claim provided on 28th October 2022.

(17) EJ Salter also ordered that, by 11th November 2022 the claimant should provide to the Respondent and Tribunal full particulars of his claim: (a) concerning breach of the Health and Safety at Work Act 1974; (b) for aggravated damages; (c) for personal injury.

(18) On 11 November 2022, the Claimant provided the Tribunal and Respondents with an Application to Amend, Further and Better Particulars and Schedule of Loss.

Strike Out Application

(19) The Respondents applied to strike out the Claimant's claim because he had not actively pursued it, or that his conduct of it had been unreasonable. They relied on 2 witness statements of Anthony Field, the Fourth Respondent.

(20) The Claimant also made provided a witness statement for this hearing.

(21) Both parties made submissions. The parties agreed that the witnesses would not be cross examined.

Strike Out - Claim not Actively Pursued - Law

(22) The Respondents' strike out application was brought under *Rule 37(1)(d)* and, in the alternative, *Rule 37(1)(b) ET Rules 2013*, which (so far as material) provide that: "(1) At any stage of the proceedings … a Tribunal may strike out all or part of a claim or response on any of the following grounds ... (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious… (d) that it has not been actively pursued."

(23) In *Evans v Metropolitan Police Commissioner* [1993] ICR 151 the Court of Appeal accepted that the principles set out in *Birkett v James* [1978] AC 297 applied to applications for strike out "for want of prosecution"(the wording of the rule at that time). At p156H LJ Steyn said that the Court could only make sense of the rule by treating, "the requirements of Birkett v. James as applicable mutatis mutandis to applications before industrial tribunals to strike out claims for want of prosecution."

(24) Those principles were set out by Lord Diplock in *Birkett v James* at p 318E-G, "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

(25) In *Evans v Metropolitan Police Commissioner* [1993] ICR 151 the Court of Appeal said that one relevant factor in deciding whether to strike out a claim for failure actively to pursue a claim is that there is a public interest in having discrimination claims determined, p157 A - D, Steyn LJ.

(26) In *Rolls Royce plc v Riddle* [2008] IRLR 875 at para [20] Lady Smith explained the *Birkett v James* principles: "These principles appear to have been identified because [of there being justifiable cause for concern about two problems of which a failure to actively pursue a claim may be indicative. The first is that it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim. That is a distinct and different matter from the second problem which is that if a claimant has failed to actively pursue his claim to an inordinate and inexcusable extent so as to give rise to a risk of real prejudice to the respondent if the claim were to carry on, then a question arises as to whether or not there can still be fair trial and if there is doubt about that whether the claim should then be prevented from going any further."

Discussion and Decision

(27) I considered, first, whether the Claimant's default had been intentional and contumelious default in this case, under the first limb in *Birkett v James*.

(28) I noted that there had been a delay from June 2020 to October 2022 when the Claimant took no steps to advance his claim; a period of about 28 months. That is a very long time indeed.

(29) I also noted that the delay occurred in the circumstances that there was a pandemic which began in March 2020 and which affected the functioning of the Tribunals.

(30) It had been agreed that the witness statements for this hearing would stand as evidence and there would be no cross examination.

(31) In his witness statement, the Claimant accepted that he had not proactively chased the Employment Tribunal during the 28 month hiatus. He said however, that he was very aware of delays in the Employment Tribunals because of the pandemic and that, "I appreciated that… I was like any other Claimant and no right to expect priority over other cases and that I had to trust that London Central would in due course get round to my case. I considered that I had to be patient, as there were thousands in a similar position." … "I understand that once a claim has been filed by a Claimant, the normal course is to allow the Tribunal to perform its responsibility to case manage the claim to a final determination at a substantive hearing. I am not aware of any obligation on a Claimant to pro-actively chase Employment Tribunals, let alone in the exceptional and unprecedented circumstances mentioned above, regardless of their profession."

(32) The fact of delays and disruption in Employment Tribunals during the pandemic was reflected in Presidential Guidance at the time, which said that was that certain types of claim were being prioritised (none of which had been brought by C), that "parties may experience a significant delay in receiving replies to correspondence and telephone calls may not be answered" and that parties should avoid "unnecessary correspondence" and "only write to the tribunal if you want to make an application for a case management order or tell the tribunal something important that the tribunal needs to know about your case".

(33) The Tribunal did not list any hearings or make any orders during the 28 month period. The Claimant did not fail to comply with any orders. He was simply inactive. I considered that that inactivity was to be seen in the light of the pandemic, certainly during 2020 and for much of 2021.

(34) It was difficult to see how inactivity in a period of national disruption which affected the Tribunals could be categorised as intentional and contumelious.

(35) I did not agree with the Respondent that the Claimant's explanation for delay should not be accepted and that, instead I should conclude that the Claimant had deliberately not pursued his claim because EJ Hodgson's judgment in his interim relief application was critical of his case. The witness statement evidence was not challenged in cross examination.

(36) However, the further delay in the Claimant pursuing his claim, during late 2021 and into 2022 was less understandable. The Tribunal has returned to conducting all types of hearing. Claims have been accepted promptly and given preliminary hearings reasonably promptly since at least late 2021.

(37) Nevertheless, while the Claimant had failed to be proactive, I did not consider that there are additional elements to his conduct which showed that he had disrespect or contempt for the tribunal and/or its procedures as described in In *Rolls Royce plc v Riddle* [2008] IRLR 875.

(38) The extreme length of the delay in pursuing his claim from late 2021 and until October 2022 on its own did, in my view, amount to inordinate and inexcusable delay under the second limb in *Birkett v James*.

(39) I noted the Claimant's evidence that he had been dealing with close family members' illness in 2021 and 2022. However, he had been able to progress the claim in 2022 despite these unfortunate circumstances. His family circumstances did not excuse the delay.

(40) I noted that the Respondents' complaint to the SRA about the Claimant retaining documents was concluded in November 2020, so that did not explain the delay in 2021 and 2022.

(41) The Claimant said that he was in the process of changing solicitors. He did not explain why that process had taken 2 years and therefore how it could excuse the delay.

(42) I concluded that the Claimant had also acted unreasonably in the way he had conducted his claim, by delaying in this way.

(43) However I did not accept that the delay was such as gave rise to a substantial risk that it was not possible to have a fair trial of the issues in the action, or was likely to cause or to have caused serious prejudice to the defendants.

(44) I acknowledged Mr Field's evidence that his memory of events has faded. I accepted that the fading of memories would be inevitable in the face of this delay and that that was a very substantial factor to be taken into account.

(45) However, the Claimant had set out his claim very fully at the outset of the proceedings. The Respondents presented a detailed response to the claim, presumably having taken instructions from relevant witnesses in order to do so.

(46) Further and unusually, there had been an interim relief hearing. The Respondents presented witness statements to it, dealing with each of the detriments and/or the matters relied on as constituting a fundamental breach of contract - and the Respondents' reasons for them. The Respondents are therefore in an unusually good position in that that evidence was prepared at a very early stage. That provides a significant amelioration of the risk of memories having faded.

(47) There was also disclosure of documents in relation to that interim hearing.

(48) While the Respondents relied on the fact people have left the organisation, there was no evidence that these individuals would not be available as witnesses if genuinely required.

(49) I did not accept that the Respondents were justified in concluding that the claim would not be proceeded with, when there had been no strike out and the Claimant had never given any positive indication that he was not pursing it. Correspondence between the Claimant and Respondents concerning costs demonstrated that the Respondents were aware that the Claimant intended there to be a full merits hearing. The SRA had also told the Respondents in November 2020 that the Claimant anticipated further ET hearings in his claim.

(50) The Respondents' failure to make financial provision for the hearing was the Respondents' decision.

(51) I did not find that the fact that individual Respondents would face proceedings persuasive towards striking out the claim. I considered that there was an equal, if not greater, public interest in having important discrimination and protected disclosure claims heard.

(52) Ultimately this is a case where "orderly preparation" for trial can still be made in the usual manner. It would not be proportionate simply to strike it out.

Claimant's Amendment Application

(53) The Claimant had presented very substantially amended Grounds of Complaint.

(54) In deciding whether to allow an amendment the Employment Tribunal is guided by the principles set out in *Selkent Bus Company v Moore* [1996] IRLR 661. In deciding whether to grant an application to amend, the Tribunal must balance all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment: applications to amend range, on the one hand, from correcting clerical and typing errors and the additional factual details to existing allegations and the additional substitution of other labels for facts already pleaded to and, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

(55) Other factors include the applicability of time limits: if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended. Other factors to be considered include the timing and manner of the application: an application should not be refused solely because there has been a delay in making it, as amendments can be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made, for example the discovery of new facts or new information appearing from the documents disclosed on discovery.

(56) Having heard argument from both sides, I decided as follows:

(57) I did not permit the Claimant to amend his claim to add paragraphs [9] [12] of his amended particulars as allegations of race discrimination. They were presented after a very substantial delay after the claim was presented and since the events were alleged to have occurred. No good reason has been shown as to why they were not brought before – the Claimant is an employment solicitor and was represented when he presented his detailed claim in 2020. He must have known of the events when they occurred. There would be substantial hardship and injustice to the Respondents in responding to these complaints brought so long after the event. Their recollection of events would be bound to have been

significantly impaired by the passage of time. By contrast, there would be little prejudice to the Claimant if the amendment to the claim were not permitted. The Claimant would still be able to refer to the alleged matters by way of background. The Claimant has numerous other complaints of race discrimination which are proceeding to a final hearing.

(58) I did not permit the Claimant to amend to add paragraphs [22] – [24] of the amended particulars. They pleaded an entirely new protected disclosure, which could give rise to a new free standing claim of protected disclosure detriment / dismissal. Again, there was no good reason why these particulars were not pleaded when the claim was originally brought and the delay in amending was inordinate and unjustifiable. The Respondents would be significantly prejudiced if the amendment were permitted. I had not struck out the original claim partly because the Respondents had prepared witness statements and disclosure for the interim relied hearing in relation to the protected disclosure claim as was originally pleaded. That did not apply to the amendment which the Claimant now sought to make. The Claimant, on the other hand, still had his original protected disclosure claim.

(59) I did not permit the Claimant to add new paragraphs [14] – [16] by way of amendment. These made allegations about the Respondents' treatment of different people, of different races, in different circumstances. The allegations would involve the Tribunal embarking on an side enquiry into facts about third parties which were likely to be of tangential relevance to the Claimant's case. Again the amendment was made long after the case commenced and long after the relevant events. There would be prejudice to the Respondents which correspondingly little prejudice to the Claimant particularly when the allegations, even of proven, would have little bearing on the merits of his claim.

(60) I allowed the Claimant to amend his claim to add the amendments to new paragraph [48]. I decided that the Claimant had pleaded, in his original paragraphs [6.4] and [6.5]. that the matters which led to his resignation were also allegations of race discrimination and harassment. His original paragraph [26], now [48], pleaded that the detriments in that paragraph had led to the Claimant's resignation. On a true construction of his original complaint, original paragraphs [6.4] and [6.5] referred to original paragraph [26]; the amendment simply confirmed this and was a very minor clarificatory amendment. It brought no new claim or allegation and there was no prejudice to the Respondents in permitting it.

(61) On the basis that the Claimant conceded that new paragraphs setting out additional background amounted to additional voluntary particulars - to which the Respondents would not be required to plead and no adverse inference could be drawn from such a failure to plead – I allowed the Claimant to amend to include additional background. It seemed to me that, if the Respondents were not required to put in a formal reply to such voluntary particulars, there would be little disadvantage to the Respondents in learning more of the Claimant's evidence at an early stage.

(62) I permitted the Claimant to add new paragraphs [40]-[43]; I agreed with the Claimant that these simply set out additional background;

(63) I permitted the Claimant to add new paragraphs [8, 11, 29-34, 38, 45, 49-54, 56-58, 61], as these amounted to the provision of additional detail in relation to factual allegations that were already pleaded within the original Grounds of Claim;

(64) I permitted the Claimant to make the minor amendments to factual allegations already pleaded, contained in new paragraphs [11, 19, 21, 25-27, 36];

(65) I permitted the Claimant to amend to add additional detail in relation to the matters relied upon by the Claimant in support of his alternative case that the treatment he was subjected to amounted to direct race discrimination and/or harassment related to race, set out in amended paragraphs [10] and [13], [17 - 18].

(66) The Respondents asked, and the Claimant agreed, that clients' names be removed from paragraphs [52] – [54], to preserve confidentiality. The parties will agreed a code for client names.

Preparation for Final Hearing

(67) I made orders for preparing for the Final Hearing. These are set out below. I raised the possibility of Judicial Mediation but there was no consensus that Judicial Mediation was appropriate.

ORDERS
Made pursuant to the Employment Tribunal Rules 2013

Final Hearing

1. The Final Hearing is listed for **14 days on 10 – 13, 16 – 20 and 23 – 27 October 2023** before a Full Tribunal**, in person**, to consider both liability and remedy.

Updated Schedule of Loss

2. **By 2 October 2023** the Claimant shall send to the Respondent an updated schedule of loss **calculated to last day of the hearing,** setting out the sums he claims, including financial loss and injury to feelings, and also setting out the sums he has received or earned since his dismissal.

List of Issues

3. **By 24 February 2023** the parties shall agree a comprehensive List of Legal and Factual Issues in the claim and response and shall send it to the Tribunal.

Amendment

4. The Claimant has permission to make the following amendments to his grounds of complaint:

   a. The amendments in new paragraph [48]; [40]-[43]; [8, 11, 29-34, 38, 45, 49-54, 56-58, 61], [11, 19, 21, 25-27, 36]; [10] and [13], [17 -18] and, as background only, [9] and [12].

5. Clients' names shall be removed from paragraphs [52] – [54], to preserve confidentiality. The parties shall agreed a code for client names.

Disclosure of Documents and Bundle

6. **By 28 April 2023** the parties shall disclose to each other all the documents they have in their possession, relevant to all issues in the claim and response, and relevant to compensation, by providing a list and copies of those documents to each other.

7. The Respondents shall prepare the Bundle for the Final Hearing. They shall send a draft index to the Bundle to the Claimant by **12 May 2023.**

8. By **26 May 2023** the Claimant shall tell the Respondents what additional documents need to be included in Final Hearing Bundle on his behalf.

9. **By 9 June 2023** the parties shall agree the contents of the indexed, paginated Final Hearing Bundle, containing all relevant documents, and the Respondents shall prepare and send a electronic copy of the Bundle to the Claimant. The Respondent shall send any updated electronic copy of the Bundle to the Claimant for use at the Final Hearing.

10. The Respondents shall bring 5 copies of the Bundle to the Final Hearing.

Witness Statements

11. The parties shall exchange witness statements for all witnesses, including a witness statement from the Claimant, for the Final Hearing by **28 July 2023.**

12. The witness statements should be in numbered paragraphs, on numbered pages.

13. Each witness statement should set out all the evidence which that witness intends to put before the Tribunal on all the issues, including the issue of compensation.

14. If the witness refers to a document, the witness statement should refer to page/s in the agreed Bundle.

15. A failure to comply with this order may result in a witness not being permitted to give evidence because it has not been disclosed in a witness statement; or in an

adjournment of the hearing and an appropriate order for costs caused by such adjournment.

Cast List and Chronology

16. The Claimant shall send a draft cast list and chronology to the Respondents by **2 October 2023.** The parties shall attempt to agree a cast list and chronology for use at the final hearing.

Other matters

Public access to employment tribunal decisions
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

You may apply under rule 29 for this Order to be varied, suspended or set aside.

____

Employment Judge Brown

20 January 2023

Judgment sent to the parties on:

23/01/2023

For the Tribunal: