EMPLOYMENT TRIBUNALS

Claimant: **Miss K Paczkowska**

Respondent: **R-COM Consulting Limited**

Heard at: Manchester (by CVP) **On: 7 November 2022**

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person
Respondent: Mr Gilbert (Solicitor)

JUDGMENT- PRELIMINARY HEARING

The Respondent's application for an order striking out the claim is refused.

REASONS

Introduction

1. The purpose of this preliminary hearing was to consider and determine the respondent's application for a strike out of the whole of the claimant's claim. The claimant represented herself. The respondent was represented by Mr Gilbert of Peninsula. Both parties provided me with written arguments and some documents which I have considered together with the submissions they made at the hearing.

2. The hearing was a video hearing using the Tribunal's CVP platform. Whilst there were some initial connection difficulties, these were resolved and we could hear and see each other well.

These proceedings – a brief summary

3. In this claim the claimant raised various complaints against the respondent, under the Equality Act 2010. A final hearing took place on various dates in September 2018. For various reasons, Judgment was not provided until September 2019.

4. The claimant succeeded in one complaint – a complaint of victimisation (relating to the provision of a reference to a prospective employer). Other complaints were dismissed.

5. The claimant appealed to the Employment Appeal Tribunal. That appeal was in part successful. 2 issues have been remitted for determination by the Employment Tribunal. One is a time limit (jurisdiction) issue and the other requires the Tribunal to consider whether the act that the Tribunal decided was victimisation, also amounts to direct discrimination.

6. A further appeal to the Court of Appeal resulted in one more issue being remitted; whether the respondent was vicariously liable for comments made by a Mrs Dando.

7. The issue of remedy remains outstanding in relation to the complaint of victimisation, as do issues arising from the successful aspects of the claimant's appeal. That hearing is listed on 14,15 and 16 February 2023.

8. The claimant's appeals against findings made in the majority of complaints that were heard and decided on were unsuccessful. The parties have finality as far as the majority of complaints are concerned. There is o0ne remedy issue and 2 liability issues that remain outstanding and are due to be determined at a (second) final hearing in this case.

9. In the course of conducting these proceedings the claimant acted in ways that amounted to contempt. The Solicitor General brought contempt proceedings against the claimant. A custodial sentence was imposed, suspended for 12 months.

The application

10. The respondent's application is made under Rule 37 of the Employment Tribunal Rules of Procedure 2013, specifically under Rule 37 (1)(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, vexatious or unreasonable."*

11. The respondent mainly relies on the claimant's conduct which has led to her being found guilty of contempt.

12. The actions which led to her being found to have been in contempt are, in summary, as follows:-

a. That at the final hearing of this case in September 2018 the claimant covertly recorded the hearing.
b. That on or before 29 April 2021, the claimant published (on a publicly accessible on line platform) a link to those recordings.
c. That subsequently she did not delete the publication even though she had been told in correspondence from the Tribunal dated 4 May 2021, that she must do so or face proceedings for contempt. Rather than delete the publication, she published the Tribunal's correspondence. .

13. The platform on which the links appeared is Twitter. According to the respondent the claimant has 440 or so followers.

14. The respondent also relies on other actions of the claimant which are closely linked to those actions which led to her being found guilty of contempt. These are:-
    a. That the claimant has publicly criticised the Tribunal in comparing parts of her typed transcript to the Tribunal's judgment
    b. That the claimant has publicly (via her twitter account) accused the respondent's representatives and the judiciary of *"working together"* in an effort to *"destroy"* the claimant's case. The respondent provided a *"screenshot"* of the relevant post (page 89)
    c. That the claimant has uploaded on to her Twitter account the letter from the Tribunal dated 4 May 2021 in which the Regional Employment Judge asked the claimant to confirm that she had deleted the recordings made and making clear the potential consequences of her not doing so.
    d. That the claimant has not apologised for her actions; she has only apologised for being found in contempt of court.

15. In his skeleton argument, Mr Gilbert submitted that the claimant's conduct in (1) covertly recording the final hearing and proceeding to publish the recordings into the public domain, via her twitter account (2) publicising the Tribunal's letter of 4 May 2021, amounts to unreasonable, scandalous and/or vexatious conduct. He accepted that consideration needs to be given as to whether a fair trial remained possible. He made the following submissions:-
    a. That the claimant has committed these acts in the past and demonstrated she is prepared to act unlawfully when matters are not found in her favour. The claimant could act in a similar way in the future (in contempt) if matters do not go her way at the next hearing.
    b. That the respondent has no faith that the claimant will refrain from covert recordings in the future – noting particularly the terms of the Tribunal's letter of 4 May 2021, the information provided to the claimant in that letter and the instruction given to her to delete the recordings. Not only did the claimant ignore the instruction to delete the recordings, she uploaded a copy of the REJ's letter on her public Twitter account.
    c. That the claimant has made what Mr Gilbert refers to as *"a very serious and ludicrous"* allegation against the respondent's representative and

the Employment Tribunal of colluding to destroy the claimant's case. Further, this allegation was made publicly, on the claimant's Twitter account.

d. That the claimant's actions amount to inappropriate attempts to influence in some way the judges, appointed representatives and the respondent/respondent's witnesses; that she is (according to Mr Gilbert's written submissions) *"hell bent on causing as much disruption, embarrassment and inconvenience to the tribunal, the respondent and the respondent's representatives."*

16. For these reasons, said Mr Gilbert, a fair trial is no longer possible.

The claimant's reply.

17. The claimant provided 2 detailed documents; one from November 2021 and the other prepared specifically for the hearing in November 2022. I have reviewed both (as the claimant provided me with both) but have taken particular note of the recent one.

18. In her submissions against the respondent's strike out application, the claimant put forward various arguments, seeking to explain or mitigate those actions which had led to her being found guilty of contempt. It was these arguments in particular that persuaded me to reserve my judgment and await the full judgment from the High Court. They are listed at paragraphs 4.6 of her submissions document.

19. In relation to an apology: the claimant referred me to her apology to the Tribunal made late on 4 November 2022 (just after she had been found in contempt of court) by email *"It is with sincere apologies Claimant has been found of the contempt of court today with suspended sentence and very significant cost order."* I note that the claimant has not apologised for making an allegation of collusion between judges and respondent's representatives; the claimant has not apologised for ignoring the instructions set out in Tribunal's letter of 4 May 2022. This hearing was a further opportunity for the claimant to provide those apologies and she did not do so.

20. Since learning that the recording of hearings was prohibited the claimant has twice followed the correct route of applying for permission to record the hearings and has been granted that permission, subject to conditions. The claimant has complied with the conditions.

21. The claimant referred to (and played me recordings of) the following publicly available sources

a. A recording of the President of the Employment Tribunals (Judge Barry Clarke) on delayed judgments
b. A recording of REJ Wade on the burden of providing written reasons without the benefit of transcripts.

(the claimant's written submissions refer to various other sources regarding the difficulties of hearings without recordings of evidence, which I have also considered)

22. The claimant has already been punished for her actions – with the suspended custodial sentence and order to pay costs of £8500. The claimant should not be punished twice for the same misdemeanour (the claimant here citing ECHR protocol 7, Article 4)

The judgment

23. I received the judgment of Mr Justice Chamberlain in the contempt proceedings in week commencing 23 January 2023. I have read it. Having done so, I do not accept the points put forward by the claimant by way of mitigation. However I note that paragraph 4.6 of the claimant's submissions refers to mitigating points put forward at the hearing. In her written document she does not say they were accepted by Chamberlain J. That judgment (and the penalty imposed) speaks for itself.

Email from Peninsula dated 7 November 2022

24. On the same day as and following this preliminary hearing, Peninsula sent an email to the Tribunal with screenshots which they say:-
    a. tend to show that some of her submissions made at the preliminary hearing involved her being untruthful.
    b. Indicate that she may still be in Contempt.

25. The claimant replied to the respondent's contentions that same afternoon. In essence she accused the respondent of being creative with the screenshots and confirming that she had provided instructions for all transcripts and recordings top be removed.

The Law

26. I have already quoted the ET Rule 37(1)(b) under which this application is made. I have been referred to various judgments

27. I note the judgment of the Court of Appeal in **Bennett v. Southwark LBC [2002] ICR 881** (Bennett). It provides helpful guidance including as to how I should regard the term "scandalous" It notes that scandalous in the context of this part of the ET Rules (albeit a previous version of the Rules) is not the same as 'shocking' This is how Sedley LJ describes it (para 28)

> *"Without seeking to be prescriptive, the word 'scandalous' in its present context seems to me to embrace two somewhat narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process."*

28. The judgment in Bennet also makes clear that even where the conduct of the proceedings is categorised as scandalous, a tribunal must then go on to consider whether striking out is a proportionate response. This is what is said at paragraph 29:

> *"But proportionality must be borne carefully in mind in deciding these applications, for it is not every instance of misuse of the judicial process, albeit it properly falls within the description scandalous, frivolous or vexatious, which will be sufficient to justify the premature termination of a claim or of the defence to it. Here, as elsewhere, firm case management may well afford a better solution."*

29. I have also considered the Court of Appeal's judgment in the case of **Blockbuster Entertainment v. James [2006] IRLR 630 ("James")**. In this case the EAT overturned the decision of the Employment Tribunal to strike out the claimant's claim because the claimant had not complied with case management orders. I note particularly the following passage from the judgment.:-

> *"The power of an employment tribunal under rule 18(7) to strike out a claim on the grounds that an applicant has conducted his side of the proceedings unreasonably is a draconic power, not to be too readily exercised. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these two conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. This requires a structured examination. The question is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take account of the fact, if it is a fact, that the tribunal is ready to try the claims, or that there is still time in which orderly preparation can be made."*

[Note: Reference to rule 18(7) is to the previous version of the ET Rules (from 2004) but the wording of current rule 37 is effectively the same.]

30. James was a case in which a strike out application was made at the final hearing itself. I note the comment at paragraph 19 of the judgment that *"it takes something very unusual indeed to justify the striking out on procedural grounds of a claim which has arrived at the point of trial."*

31. Mr Gilbert also referred me to the decision in **De Keyser v Wilson UKEAT/1438/00** (De Keyser) his written submissions noting that in that case the EAT *"held that a claim should not be struck out on the basis of a party's conduct, unless a fair trial was no longer possible."* I agree that is the essence of that judgment. At the very least a Tribunal judge considering an application such as the one before me must ask whether a fair trial is possible and if it is, then that Judge would need to

provide exceptional and convincing reasons if their decision was to strike out the claim anyway.

32. I have considered whether conduct might be so unreasonable that the issue of fair trial should not have to be considered. However, having regard to the references made in De Keyser to the decision in **Arrow Nominees v. Blackledge [2000] 2 BCLC 167**(see reference at para 24 of De Keyser) I have decided that is not the position and the question as to whether a fair trial is possible, should always be asked. That is what I have done.

My Decision

33. The claimant's conduct falls well within the definition of scandalous, vexatious or unreasonable for the purposes of Rule 27 (1) (b). The claimant's conduct which has led to her prosecution for contempt is scandalous. It meets the definition in Bennett. It gives gratuitous insult to the Tribunal in the course of the legal process. It also meets the definition of unreasonable conduct.

34. As for the further conduct which Peninsula allege and describe in their email of 7 November 2022; in so far as it indicates ongoing behaviour amounting to contempt of court, it might have serious implications for the claimant given the suspended custodial sentence. I note the claimant's response. There is not enough evidence before me to decide whether this is further scandalous or unreasonable conduct,

35. Having decided that there has been conduct which is both scandalous and unreasonable, I have considered whether a fair trial remains possible.

36. I have considered the reasons provided by Mr Gilbert as to why a fair trial is not possible. Whilst Mr Gilbert has raised serious issues, they will not prevent a fair trial. comment on the points raised in paragraphs 15.a to d. above.

36.1 a and b above. It is possible that the claimant will act again in contempt. However, the outstanding suspended sentence must reduce this risk considerably.

36.2 As for 15. c above, it is agreed that the claimant's behaviour could be categorised as very serious and ludicrous. Her behaviour falls within the definition of scandalous and/or unreasonable for the purposes of Rule 37. But it does not prevent a fair trial, particularly having regard to the fact that almost all of the issues in this case have been determined.

36.3 15.d. I do not agree that the claimant's behaviour is an attempt to influence judges, representatives and/or the respondent's witnesses. I have not been provided with any evidence of undue influence. The claimant's allegations of inappropriate behaviour by Tribunal and respondents are without foundation and tiresome. But Judges and experienced representatives such as Peninsula will not be influenced by this behaviour in any way which might jeopardise a fair trial. Robust case management, including progressing the case to a fair conclusion

is a more proportionate response to the claimant's behaviour than a strike out.

37 In this case a trial has already taken place and the parties have finality on almost all issues. Very limited issues remain. One of those issues is to provide remedy for an act of victimisation that the Tribunal found took place. An Employment Tribunal has made a finding of victimisation under the Equality Act 2010. The interests of justice require the determination of a remedy. There is no reason why this ET claim cannot conclude with a remedy hearing.

38 Similarly in relation to the 2 issues that have been remitted on appeal. The claimant has exercised her right to appeal and, to some extent been successful. If a fair trial is possible then the parties are entitled to finality on these issues.

39 For these reasons, the respondent's application is refused.

Employment Judge Leach
30 January 2023

JUDGMENT SENT TO THE PARTIES ON

2 February 2023

FOR THE TRIBUNAL OFFICE