EMPLOYMENT TRIBUNALS

Claimant: **Ms A. Junaid**

Respondent: **Tower Hamlets Council for Voluntary Service**

Heard at: **East London Hearing Centre**

On: **21 - 25 August 2023**

Before: **Employment Judge Massarella**
Members: **Ms T. Jansen**
Mrs S. Jeary

Representation
Claimant: In person
Respondent: Ms C. Urquhart (Counsel)

REASONS

Judgment having been sent to the parties on 25 August 2023, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

Procedural history and evidence

1. The claim form was presented on 10 December 2021, after an early conciliation period between 11 October and 22 November 2021. The claims were of race and disability discrimination, including an alleged discriminatory constructive dismissal. There was a preliminary hearing for case management on 15 June 2022. The case was listed for full hearing over five days this week.

2. There was some lack of clarity about the list of issues and the Claimant provided written clarification, identifying where each issue in the agreed list was dealt with in her witness statement.

3. A more substantial preliminary issue also arose: the Claimant applied to admit a large number of transcripts of covert recordings she had made of meetings during her employment. That issue took the best part of the second day to resolve. In the event, and for the reasons given orally at the hearing, the Tribunal admitted into evidence only those transcripts whose accuracy could be checked because an equivalent audio recording existed. Where there was no audio, we excluded the transcripts.

4. In our oral decision on the admissibility issue, we observed that we found the Claimant's general explanation as to why there was no audio for some of the lengthier transcripts to be neither cogent nor satisfactory. We went further in relation to two very brief, partial transcripts. Each was less than a page long; each was said to record crucial evidence which, if true, would be strongly probative of two central allegations. The Claimant gave an explanation as to how she happened to have recorded only those parts of the two conversations and no other, which we found 'implausible to the point where we doubt whether these transcripts are in fact transcripts at all, let alone accurate transcripts.'

5. Thus, before the events which occurred on the fourth day of the hearing, we had expressed a serious concern about the truthfulness of representations made by the Claimant to the Tribunal, albeit at that stage not under oath.

6. It took most of the first two days to resolve all the preliminary issues, partly because we rose early on the first day to give the Claimant the additional time she asked for to work on the clarification of her claims overnight.

7. We began to hear evidence from her at 3.10 p.m. on the second day. After an hour, and as we had said we would do, we took a break at 4.11 p.m. by way of an adjustment for the Claimant. Before the break I gave the Claimant the usual warning about the importance of not discussing her evidence with anyone while she was in the middle of her evidence, including with Ms Shahzad, her friend who was accompanying her to the hearing. Although Ms Shahzad had initially been recorded as the Claimant's representative on the Tribunal file, at the hearing the Claimant represented herself. Ms Shahzad was also going to be a witness in the case but at the end of the third day of the hearing the Claimant told us that she was not going to call her after all.

8. Not only did I give the Claimant the warning about not discussing her evidence, I also explained the importance of it: the fact that the Tribunal must hear the evidence of the person in the witness box, with no suggestion that it might have been influenced by another person. We are certain that the Claimant understood the significance of the warning.

9. I gave the warning again at the end of the second day at 16:39; I gave it again on the third day of the hearing before the mid-morning break at 11:26; and again before we finished for the day at 16:44.

10. The last issue that Ms Urquhart (Counsel for the Respondent) questioned the Claimant about on the afternoon of the third day was an allegation of direct race discrimination and harassment related to race (issues 18(g) and 31(b)), that 'in or around March or April 2021, Alison Robert compar[ed] the disparities projects to the HIV prep program for all African women'.

11. Reference was made to a transcript of the conversation, which we had admitted into evidence earlier in the week, which recorded Ms Robert (the Claimant's manager) referring to 'women from African countries' in the context of a discussion about HIV. The Claimant explained at some length why she considered that this was discriminatory. There were several references in the cross-examination of the Claimant on this issue to 'African women' and 'African countries'.

12. At the beginning of the fourth day of the hearing, Ms Urquhart told the Tribunal that the previous day, on her way to East India DLR station (a three-minute walk from the Tribunal), Ms Healy-Birt, who is the chair of the Respondent's trustees and a solicitor (though not the instructing solicitor in this case) and had been observing the hearing, overheard the Claimant and Ms Shahzad talking about the case on their way to the station.

13. The Tribunal retired for a few minutes to consider how to proceed. One of the Tribunal members, Mrs Jeary, told me that she had also seen the Claimant and Ms Shahzad entering East India station and standing on the platform together, but she had not overheard them because she had deliberately kept her distance.

14. We then resumed and told the parties that we would hear evidence on oath from Ms Healy-Birt and from the Claimant so that they could give their respective accounts.

15. Ms Healy-Birt said that, after leaving the Tribunal she walked to East India station. As she was in the station heading up towards the platform, she realised that the Claimant and Ms Shahzad were close by. She heard the Claimant speaking to Ms Shahzad, saying: 'as I was saying, we were talking about women from African countries'. Ms Shahzad was nodding and saying 'yes'. It appeared to Ms Healy-Birt that the Claimant was going to continue speaking, but she moved away from them and went up onto the platform. She did not hear the rest of conversation and did not interact with them.

16. We gave the Claimant an opportunity to ask Ms Healy-Birt questions. She asked Ms Healy-Birt to repeat what she said she had heard, which she did. The Claimant then said: 'I can't recollect that'.

17. We then took evidence on oath from the Claimant. I asked her three open questions to elicit her evidence: she confirmed that she had gone to East India station with Ms Shahzad; she denied that she had any discussion about the case. Ms Urquhart then asked some questions in cross-examination. The Claimant gave a detailed description about her interactions with Ms Shahzad. Among other things, she told us that she had spoken to Ms Shahzad about the fact that she was going on holiday at the end of the week and that she had not even packed yet. She said they were laughing about this on their way up to the platform when the Claimant realised that Ms Shahzad was on the wrong platform because she was going in the opposite direction. Asked by Ms Urquhart whether she accepted that she had been talking about women from African countries, the Claimant said again that she could not recollect talking about the case.

18. The Tribunal then retired with a view to making findings as to what had happened. In the course of those discussions, Mrs Jeary said that she was concerned that the Claimant's account of her and Ms Shahzad's movements did not appear to tally with what she had observed although, subject to further clarification, it might do. That raised a separate, potentially equally serious issue, as to whether the Claimant had given an untruthful account of her movements in her evidence (essentially as to whether the Claimant and Ms Shahzad had taken the same train).

19. We concluded that we would need to hear further evidence from the Claimant, and possibly Ms Shahzad and Ms Healy-Birt. We resumed the hearing, and I told the parties that an additional factor had arisen which was that Mrs Jeary had observed, but not overheard, the Claimant and Ms Shahzad. I did not at that point disclose the detail of what Mrs Jeary had said, in case it might influence those we proposed to hear from.

20. The Claimant, Ms Shahzad and Ms Healy-Birt then all gave their accounts of what they had seen and done on the station.

21. At the beginning of her evidence, I asked Ms Shahzad an open question: whether she remembered the Claimant talking about African women? She said 'yes, I think so, I don't remember, I wanted to talk about her trip to India, I was more interested in that'. I asked a confirmatory question, whether she talked about this in the context of a discussion about her evidence; Ms Shahzad then said no. I asked what context it was in; Ms Shahzad said: 'I meant she was talking about African women in this room this morning; she did not talk about it yesterday'.

22. I pointed out that a moment earlier she had said that she wanted to change the subject and talk about the Claimant's holiday, which might suggest she was referring to the conversation the Claimant had described having the previous day. From that point onwards Ms Shahzad consistently denied that the Claimant had talked about her evidence the previous day.

23. To our surprise, Ms Shahzad's account of how much time she spent on the station with the Claimant then completely contradicted the Claimant's account: Ms Shahzad said that she never went up to the wrong platform with the Claimant.

24. Ms Healy-Birt did not see the Claimant and Ms Shahzad on the same platform but she had moved along the platform to distance herself from the Claimant and acknowledged that they may have been together.

25. After we heard from the three witnesses, I read out Mrs Jeary's account of what she had observed.

26. We then heard Ms Urquart's application to strike out the case. I set out her main points below.

27. Ms Urquhart submitted that the case should be struck out because the manner in which the proceedings had been conducted was unreasonable and it was no longer possible to have a fair hearing. She contended that Ms Healy-Birt's account was straightforward. She summarised the Claimant's account. She submitted that Ms Shahzad's first answer had a ring of truth and suggested that she had then realised her mistake and changed her position; the fact that she gave an account of hers and the Claimant's movements around the station which was contradicted by all three other accounts, including the Claimant's, should lead the Tribunal to consider her an untrustworthy witness. She invited us to find that they had probably taken the same train together. Ms Urquhart reminded the Tribunal that it gave repeated reminders to the Claimant not to discuss her evidence. She submitted that it was not possible to ring-fence that part of the case which related to the evidence the Claimant had discussed: if the Claimant has lied about discussing that, it infected all her

evidence and her evidence goes to all the issues. She submitted that the fact that the words were spoken to Ms Shahzad, who had been present throughout the hearing, made it likely that it was part of an informed conversation about the case.

28. As Ms Urquhart then proposed to refer to the *Chidzoy* case (see below), I provided the Claimant with a hard copy of the case and asked Ms Urquhart to take the Tribunal and the Claimant through it slowly and in detail, which she did. She concluded by inviting the Tribunal to strike the Claimant's claims out in their entirety.

29. We then took a slightly longer lunch to give the Claimant an opportunity to consider her response. When we returned, she read out her response from a prepared statement. I set out her main points below.

30. She started by thanking the Tribunal panel and observing that she thought it had shown her dignity during the hearing by understanding her needs. She observed that fairness must be at the heart of the Tribunal's decision. She reminded us that she was not a legal person and that the Respondent had that advantage. She had upheld her dignity while being described in the way that she had been this morning by the Respondent's Counsel. Her values chose her long ago; she did not choose them. She knew that she had not talked about her case the previous afternoon; she was simply relieved the day was over. She had a great deal of respect for Ms Shahzad, who had been nothing but a great support to her; she upheld Ms Shahzad's dignity even if the account of her testimony did not seem to add up; she was a person of integrity. As for Ms Healy-Birt's and Mrs Jeary's accounts, there was an element of difference in all four accounts, no matter how small; she described it as a '6 and 9 comparison' (things appearing differently when seen from different angles). The Claimant then made a number of criticisms of the Respondent's representatives' conduct of the proceedings and observed that they were 'not role models'. She stood by her truth that she did not talk about her case; she had been tired the previous day, as had Ms Shahzad.

31. We then rose and deliberated for the rest of the afternoon. We gave our judgment and oral reasons on the morning of the fifth day of the hearing.

The law

32. Rule 37 of the ET Rules provides:

> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -**
>
> **[…]**
>
> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
>
> **[…]**
>
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**

33. Rule 41 provides:

> **The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.**

34. In *Chidzoy v British Broadcasting Corporation* (2018) UKEAT/0097/17. HHJ Eady QC (as she then was) summarised the earlier case-law at [23] onwards:

> **'23. It is common ground between the parties that the striking out of a claim is a draconian measure that should not be imposed lightly, see *Blockbuster Entertainment Ltd v James* [2006] IRLR 630 CA . More specifically, in *Bolch v Chipman* [2004] IRLR 140 the EAT (Burton P presiding) held that, where the ET is considering the possibility of striking out a claim or response due to the way in which the proceedings have been conducted, there were four matters it would need to address (I paraphrase):**
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> > **(1) There must first be a conclusion by the ET not simply that a party has behaved unreasonably but that the proceedings have been conducted unreasonably by her or on her behalf.**
> >
> > **(2) Assuming there is such a finding, in ordinary circumstances the ET will still need to go on to consider whether a fair trial is still possible, albeit there can be circumstances in which a finding of unreasonable conduct can lead straight to a Debarring Order (see *De Keyser Ltd v Wilson* [2001] IRLR 324 EAT (Lindsay P presiding)). That might be, for example where there has been "wilful, deliberate or contumelious disobedience" of an ET Order, otherwise it might be where the conduct in issue is so serious it would be an affront to the ET to permit the party in question to continue to prosecute their case (see *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200).**
> >
> > **(3) Even if a fair trial is not considered possible, the ET must still consider what remedy is appropriate and whether a lesser remedy might be more proportionate.**
> >
> > **(4) And even if it determines that a Debarring Order is the appropriate response, the ET should consider the consequences of that Order (allowing that, for example, where a response has been struck out at the liability stage, it might still be appropriate to allow the Respondent to participate in any remedy hearing).**
> >
> > **See also observations to similar effect made by the EAT (Simler P presiding) in Arriva London North Ltd v Maseya UKEAT/0096/16 (12 July 2016, unreported).**
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> **24. When an ET is satisfied that a Claimant has conducted the proceedings unreasonably (or scandalously or vexatiously), it should not move to strike out the claim when firm case management might still afford a solution - in some cases, the objectionable conduct may not be irreversible, see *Bennett v Southwark London Borough Council* [2002] IRLR 407 CA (a case in which the claim had ultimately been struck out by a second ET, the first having considered it was bound to recuse itself given the nature of the conduct in question). In order to determine whether irreparable damage has been done, the ET would need to assess the nature and impact of the wrongdoing in issue, to consider whether there was, in truth, any real risk of injustice or to the fair disposal of the case, see *Bayley v Whitbread Hotels* UKEAT/0046/07 (16 August 2007, unreported). It will, for example, be a very rare case in which it would be**

> **appropriate to strike out a case at the end of a trial; in such circumstances, it would, in almost all cases, be more appropriate for the Tribunal to dismiss the claim in a judgment on the merits, which could take account of the wrongdoing in issue, in the usual way (and see the observations to this effect in *Zahoor and Ors v Masood and Ors* [2009] EWCA Civ 650).'**

35. On the facts in *Chidzoy*, HHJ Eady QC held that it was open to the ET to conclude that the Claimant had, by her actions, unreasonably conducted the proceedings; having concluded that the trust the ET ought to have in the Claimant as a witness had been irreparably damaged, it had correctly concluded it was no longer possible for there to be a fair trial. As for whether it was proportionate to strike out the claim, the ET had considered whether there were any alternatives (including whether the claim might be heard by a differently constituted ET and whether it might make some difference if only some parts of the case were struck out, leaving other parts to be determined) but had concluded there were none. The appeal was dismissed.

Conclusions

36. The first question we have to decide is whether the Claimant did discuss her evidence with Ms Shahzad at the end of the third day of the hearing.

37. The starting point is that Ms Healy-Birt overheard the Claimant using a phrase which tallied exactly with the last topic covered in cross-examination before we broke for the afternoon and before I gave the Claimant the warning not to discuss her evidence overnight. We found Ms Healy-Birt to be a clear and careful witness. She told us only what she saw and heard and did not seek to go further.

38. As for Ms Shahzad's evidence on this issue, her immediate answer to the question as to whether the Claimant had discussed her evidence with her was that she thought she had, but that she (Ms Shahzad) had preferred to talk to the Claimant about her holiday. She then sought to resile from that in a way which we found unconvincing. We think she did so because she realised she had said something very unhelpful to the Claimant's case. We think her initial answer was the truthful answer.

39. The Claimant said twice (once in questioning Ms Healy-Birt and once on oath) she could not recollect discussing her evidence with Ms Shahzad; at another point in her evidence on oath she positively denied doing so. Those positions are contradictory: a person cannot positively deny something which she cannot recollect; and if a person is in a position positively to deny something, they cannot truthfully say that they cannot recollect it.

40. We remind ourselves that the incident occurred the previous evening. The Claimant gave a clear and detailed account of many other aspects of her walk to the station with Ms Shahzad, both in terms of where they went and what they talked about. We have no doubt that she would be able to recall whether or not she discussed her evidence with Ms Shahzad. It would be an inherently memorable thing to do, especially so soon after she had been given an explicit warning not to do it.

41. Taking all this evidence together, we are satisfied on the balance of probabilities that the Claimant used the words described by Ms Healy-Birt:

Ms Healy-Birt's evidence was clear and consistent; it was supported by Ms Shahzad's initial answer; the Claimant's evidence was contradictory.

42. We are satisfied that the words Ms Healy-Birt heard related to the evidence we had been hearing at the end of the afternoon immediately before the end of the session, when there had been multiple references to women from African countries. We find that the Claimant discussed her evidence with Ms Shahzad. We accept Ms Urquhart's submission that, given Ms Shahzad's attendance throughout the hearing, it was probably an informed conversation.

43. We have further concluded that the Claimant was being evasive when she twice said that she could not recollect discussing her evidence, and untruthful when she said that she had not done so.

44. It follows that there were two matters which might amounts to unreasonable conduct of the proceedings: a breach of the warning given to the Claimant not to discuss her evidence with anyone; and giving evasive and untruthful evidence when asked about it by the Tribunal.

45. At one stage we were concerned that there might be a third aspect to the conduct: whether the Claimant had been untruthful with regard to her and Ms Shahzad's movements around the station (whether they might have caught the same train), but ultimately we concluded - for reasons we need not go into as we resolved this issue in the Claimant's favour - that her account was compatible with Mrs Jeary's observations.

46. We did not take much comfort from this fact. We had told the parties before asking the Claimant about this subject that Mrs Jeary had observed but not overheard the Claimant and Ms Shahzad together, without telling them what Mrs Jeary had seen. In the circumstances, it would have been most unwise for anyone to give an untruthful account of something that they knew had been directly observed by a member of the Tribunal panel.

47. As we have recorded, Ms Shahzad gave an account of her and the Claimant's movements around the station which was not only irreconcilable with Mrs Jeary's account but also with the Claimant's account, in that she said that she and the Claimant did not go up to the same platform together. This was not true. Why she did this we cannot know. It is possible that she gave her account in the misguided belief that it might help the Claimant in some way by suggesting that she and the Claimant had spent less time together than they had. Although Ms Shahzad was, formally at least, on the record as the Claimant's representative, Ms Urquhart sensibly accepted that she had not carried out that role at any stage during the hearing and, if it is right that Ms Shahzad was seeking to mislead the Tribunal, that cannot be laid at the Claimant's door for the purposes of this application.

48. The next question we must ask ourselves is whether breaching the prohibition on discussing evidence, and then giving evasive and untruthful evidence on oath in seeking to deny it, amounted to unreasonable conduct of the proceedings.

49. The facts of this case are, in some ways, more serious than those in the *Chidzoy* case when the words in question were spoken by a third-party, not by the Claimant. Here, it was the Claimant, who was both a witness and a party in

the proceedings, who was discussing her own evidence less than half an hour after she had been explicitly reminded of the warning not to do so. There can be no doubt that she understood the importance of the rule because I had explained it to her.

50. We have concluded that this was a wilful breach of the Tribunal's clear instructions. The discussion was directly relevant to one of her factual allegations in relation to two claims of discrimination.

51. This was then compounded by the fact that, given an opportunity to provide an explanation, the Claimant was evasive and untruthful. We reminded ourselves that she gave that evidence under oath, and in a context when she knew that her probity was under scrutiny. It also took place against the background of the Tribunal having already, earlier in the week, expressed a concern about the truthfulness of representations made by her, albeit not under oath, as to the circumstances in which certain transcripts came to be created.

52. We have concluded that, by this conduct – by which we mean the breach of the instruction and the evasive/untruthful account - the Claimant has conducted the proceedings unreasonably.

53. We then asked ourselves whether, in the light of our findings and conclusions, a fair trial was still possible. In doing so, we had regard to the overriding objective to deal with cases fairly and justly.

54. Our starting point was that, although this incident occurred on the third day of the hearing, in fact it was still early in the substantive hearing, so much time having been taken up dealing with preliminary matters. The Claimant's evidence was by no means completed. Although Ms Urquhart had given a time estimate of an hour and a half to conclude her cross-examination, we regarded that as optimistic. There was still the whole of the victimisation claim to cover with her (which consisted of a protected act and eleven alleged detriments), as well as important aspects of the other claims, including the claim of discriminatory constructive dismissal. The Respondent had not begun its evidence.

55. We also observe that the great majority of the issues in this case turned on whether something was or was not said. Most of those issues could not be decided by reference to documents. Credibility was key.

56. We would have to be satisfied that we could trust the Claimant to give truthful, reliable answers in the remainder of her evidence, and indeed have confidence that the evidence that she had already given to us was not tainted by being discussed with other people.

57. We might have been reassured to some extent if the Claimant had frankly accepted that the discussion took place. She may have been able to make points in mitigation, for example, that the breach had not occurred before and would not occur again, or even that there was some context to the discussion which meant that it was not as serious as it appeared to be. However, the fact that she chose to deny that it took place at all has the opposite effect: it caused us even greater concern as to whether we could have any confidence in her evidence.

58. We reminded ourselves that striking a case out is a draconian sanction, which should only be imposed in the clearest circumstances.

59. We considered whether our concerns could be allayed by striking out only those issues which the Claimant was discussing with Ms Shahzad. We have concluded that this would not be proportionate. In the light of what we have found and concluded, we asked ourselves: could we have any confidence that the Claimant would give honest, reliable evidence in the remainder of the trial and that she has done so up to that point? Our unanimous answer was that we could not.

60. We considered whether there was any other course of action, short of striking out the claim in its entirety. We concluded, as had the Tribunal in the *Chidzoy* case (although we bore in mind we were perfectly entitled to reach a different conclusion) that relisting the trial before another panel would make no sense at all: that panel would know what had occurred at this hearing because it would be the subject of a public judgment; it is difficult to see how it would not share our concerns from the outset. Moreover, it would be unjust to require the Respondent to defend the case from scratch at a fresh hearing, with all the associated costs and demands on its time, because of the Claimant's unreasonable conduct. It would also be unfair for the Respondent's witnesses, against whom serious allegations of discrimination had been made, to have the case hanging over them for what would most likely be another year, until it could come back into the list. Finally, we considered it would be an inappropriate use of scarce Tribunal resources, when there are many other cases waiting to come on.

61. Accordingly, we concluded that a fair trial was no longer possible and, in all the circumstances and having regard to the overriding objective, the only proportionate course of action was to strike the Claimant's claims out in their entirety.

Employment Judge Massarella

14 September 2023