EMPLOYMENT TRIBUNALS

Claimant: Mr R Miah

Respondent: Binnies UK Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: London South Employment Tribunal On: 9 January 2024

Before: Employment Judge Burge

Appearances
For the Claimant: In person
For the Respondent: Mr Powell, Counsel

RESERVED JUDGMENT

It is the Judgment of the Tribunal that the Respondent's application to strike out part of the Claimant's claim is refused at this stage.

REASONS

1. On 21 July 2023 the Respondent made an application for strike out the Claimant's claim, or the parts of the claim that involved allegations of discrimination by the colleague. At the preliminary hearing it was clarified that the Respondent sought strike out of the first allegation the Claimant had made, that he was called "retarded" and "ignorant" by his colleague Hannah.

2. The application provided detail of conduct, believed by the Respondent to have been undertaken by the Claimant, against Hannah.

3. Hannah provided a sworn affidavit to the Tribunal detailing communications she had received from anonymous sources and those communications were provided by the Respondent.

4. While the facts are yet to be determined by an Employment Tribunal, it is uncontroversial to say that Hannah made a complaint to the Respondent about

the Claimant about his behaviours, which she characterised as harassment, and he was ultimately dismissed in January 2023. The Claimant denies harassing Hannah and claims disability, race and sex discrimination against the Respondent.

5. On 17 February 2023, the day the Claimant had entered his claim, Hannah's work email address received an email from an email address with her first name in it saying:

"Sup han2thenah,
You're ugly, childless, (too) old and obese. Now you know your fat ugly face matches your personality.
Also wash you old pussy, it smells more than Croydon fish market.
No wonder you're not married yet. Better hurry the clocks ticking..
PS I get more pussy than you and my finance is far more attractive"

6. On 18 February 2023 Hannah received two LinkedIn requests, one from Ted Bundy where his occupation was listed as Funeral Director at Brixton Cemetery. The summary said "some things aren't worth the W. Not today or next year but 10 years time ;)". The second LinkedIn profile was from Jack R said to be a Sociopath at Brixton cemetery.

7. On 3 March 2023 Hannah received another email from the email address with her first name in it with the subject "Knowledge strength integrity". There was a link in the body of the email and that link was of a tutorial of how to pick a lock which looked to Hannah like the lock on her front door.

8. On 6 March 2023 the Respondent's IT department put a block on Hannah's emails for all emails from Hotmail accounts or emails containing inflammatory words.

9. On 7 March 2023 Hannah, with the support of the Respondent, reported the communications to the police.

10. On 8 March 2023 Hannah received an email from an address with her first name in it but from an outlook account. The subject heading was "holiday destinations" and it contained a link to the government website which have an extradition agreement with the UK and there was a message saying "anywhere not on this list ;)".

11. On 31 March 2023 a twitter account was set up in Hannah's name with her picture and which followed some clients of the Respondent, the Respondent's twitter account and a number of her friends from school and University. It said she lived in Brixton, worked for the Respondent. The account liked and retweeted posts involving hatred of refugees.

12. On 20 April 2023 Hannah left the employment of the Respondent, in part because of the Claimant's actions.

13. On 26 April 2023 a Facebook profile was set up using the same photographs from the Twitter account. The name was "Lie Ing Schllatt" and said she was "feeling scared" and "I'll get what I deserve". It then said "Lie Ing Schlatt is feeing evil" and "I love to falsely accuse men of sexual harassment".

14. The Respondent's solicitor wrote to the Claimant on 10 May 2023 saying that the Respondent believed that the Claimant was the source of the online harassment and requested that he desist. The Claimant's response did not confirm nor deny that he was the perpetrator. Under oath, the Claimant confirmed that he thought Hannah lived in Brixton, said that he did not initially deny that he had been conducting the online harassment as he "couldn't be bothered" but did deny to the Tribunal that he had sent any of the messages or set up the accounts as described above.

15. In her affidavit Hannah says that the online communications have caused her great anxiety, the threats have made her fearful of leaving her house, her GP believes she has a stress induced condition and that "…any further participation in these proceedings, in any form, is likely to cause further undue harm to my health and wellbeing".

Law

16. Rule 53(1)(c) of the Employment Tribunal (Constitution and Rules) of Procedure confirms that a Tribunal has the power to consider the issue of strike out at a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part). The Respondent's application is brought 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, unreasonable, or vexatious"

17. The word "scandalous" in the context of rule 37(1)(b) means irrelevant and abusive of the other side. A "vexatious" claim has been described as a claim brought to harass, or as an abuse of process.

18. 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 and the strike out must be a proportionate response (*Blockbuster Entertainment Ltd v James* 2006 IRLR 630, CA)

19. 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. Once such a finding has been made, they must consider in accordance with the case of *De Keyser Ltd v Wilson* 2001 IRLR 324, EAT whether a fair trial is still possible.

    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.

20. In *Emuemukoro v Croma Vigilant (Scotland) Ltd and Ors* 2022 EA-2020-000006-JOJ, the EAT held that it was not necessary, in order for the power to strike to out to be triggered, for a fair trial not to be possible at all; it is enough for the power to be exercisable that, as a result of a party's conduct, a fair trial was not possible within the trial window. 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).

21. In *Anyanwu v South Bank Students Union* 2001 I.C.R. 391; [2001] I.R.L.R. 305 Lord Steyn said

> *"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. (p 399E-F)"*

22. In *Gainford Care Homes Ltd v Tipple and anor* 2016 EWCA Civ 382, CA the Tribunal's decision was upheld when it 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 the claimant who was also acting as a witness in another claimant's case, particularly by subjecting her to physical intimidation by intentionally driving a car at speed close to her as she was using a zebra crossing in the car park outside the Tribunal building. The Tribunal also carefully considered whether there was some alternative response short of barring the respondent, in particular the respondent'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.

23. In *A v B EATS* 0042/19 the claimant, a litigant in person, had sent emailed correspondence designed to intimidate a witness. The EAT decided to uphold the strike out due to a failure to comply with Tribunal Orders under rule 37(1)(c), but in relation to particular emails designed to intimidate a witness under rule 37(1)(b) Lord Summers said:

> *"Rule 37 does not state that intimidation of a witness is a ground for strike out. But it 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."* (paragraph 45)

> "….*It would appear to me that the Tribunal has erred in law in that it failed to address the question of whether strike out was necessary. The law is clear that if there is a less draconian way of securing a fair trial that way should be chosen. The Tribunal had control over who could be called as a witness. It had set out its powers in order 1. In addition, the Tribunal had power to intervene during the hearing if questions were asked that strayed beyond the realm of legitimate enquiry*…" (paragraph 53)

Conclusions

24. The online communications to Hannah and the setting up of false accounts are abhorrent, there is no doubt that they are "scandalous, unreasonable and vexatious". If it was done by the Claimant it was designed to intimidate the witness. The Claimant has denied under oath that he did it. Hannah's affidavit is persuasive, but it lacks the ability to be challenged as there was no mechanism for any questions to be asked of her and no medical evidence to show that she was not able to be asked questions nor that she was unable to participate in the proceedings.

25. 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. The Tribunal concludes that a fair trial remains possible, at this stage. The final hearing is not until 6 – 9 August 2024. The Tribunal under Rule 41 may regulate its own procedure and shall conduct the hearing in the manner it sees fair, having regard to the overriding objective. Vulnerable witnesses are able to give evidence to Tribunals and courts in many different ways. The Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings and the Equal Treatment Bench Book provide examples. Further, an update could be sought from the police between now and then which may shed light on who sent the online communications/set up the false accounts.

26. While the ordinary course of events is for the Tribunal to decide whether or not the manner the proceedings have been conducted by the Claimant has been scandalous, unreasonable or vexatious, and then to decide whether a fair trial remains possible, in this case the question of whether a fair trial remains possible should go first. That is because, having heard live evidence from Hannah, whether by the Judge asking questions, by a remote connection, written questions in advance or by some other mechanism ordered by the Tribunal, the Tribunal hearing this case should not be bound by facts that this Tribunal has found when they will have access to increased information.

Employment Judge Burge
12 January 2024