EMPLOYMENT TRIBUNALS

Claimant: Mr Samuel Weed

Respondents: (1) Cathays and Central Youth Community Project
(2) Ms Debbie Davies
(3) Ms Martha Jones

Heard at: Cardiff **On:** 5 July 2024

Before: Employment Judge S Jenkins

Representation
Claimant: In person
Respondent: Mr G Pollitt (Counsel)

JUDGMENT

The Respondent's application, to strike out the Claimant's claim on the basis that the manner in which he has conducted the proceedings has been scandalous, unreasonable or vexatious, and/or that it is no longer possible to have a fair hearing in respect of the claim, is refused.

REASONS

Background

1. The Respondents made an application to strike out the Claimant's claim by way of an email from their representative dated 17 June 2024. The essence of the application was set out in a witness statement with exhibits, attached to the email, of Mr Damian Phillips, the solicitor at the Respondent's representative with conduct of these proceedings.

2. The core of that application was that, at a preliminary hearing before Employment Judge Harfield on 1 December 2023, the Claimant had effectively accused Mr Phillips of lying about the fact of, and/or the content of, a discussion, the Claimant and Mr Phillips had had by telephone on 21 November 2023. That had led Judge Harfield to include, in her preliminary hearing summary, a reminder that parties to tribunal cases have duties to assist the Employment Tribunal to achieve the overriding objective of dealing with cases fairly and justly, and also to co-operate with each other and the Tribunal, which includes a duty to be professional and courteous in

their dealings with each other.

3. Judge Harfield further noted that ultimately a Tribunal has power to strike out a claim or response, and suggested that the parties would be best served by concentrating their attention on preparing their respective cases for the final hearing, whilst remaining polite and co-operating with each other and the Tribunal, to get the case procedurally ready for that final hearing.

4. Despite that, the Claimant made several further references to Mr Phillips's assertion regarding the call. In an email sent to Mr Phillips on 1 December 2023, the day the preliminary hearing took place, the Claimant noted that Mr Phillips should "*cease and desist [his] fabrication of the phone call that happened*". Then, on 13 February 2024, in an email sent by the Claimant to Mr Phillips in advance of a further preliminary hearing before Employment Judge Moore on 16 February 2024, the Claimant said, "*See you on Friday. This time don't lie to the courts and fabricate stories.*".

5. Judge Moore also noted, in her summary of the preliminary hearing on 16 February 2024, that the Claimant had said that he had made a complaint about Mr Phillips to the Solicitors Regulation Authority ("SRA"). The Claimant is subsequently understood to have raised a complaint about Employment Judge Moore herself, and also about Regional Employment Judge Davies' refusal to transfer the Claimant's case to a different region.

6. In relation to Mr Phillips, the Claimant made further, similar, comments to or about him in emails sent to him on 26 February 2024 and on two occasions on 9 May 2020, and also in an email to the Tribunal on that day. He again made similar comments to Mr Phillips in an email on 14 May 2024, and about him, in an email to the Tribunal on 18 May 2024, where he asserted that Mr Phillips had made "*fake/false and fictitious statement relating to the "alleged" telephone call we had*". Further similar emails were sent by the Claimant to Mr Phillips on 28 May 2024 and 5 June 2024, and to the Employment Tribunal on 7 June 2024.

7. In several of the emails sent to Mr Phillips, the Claimant indicated an intention to pursue legal proceedings against him, although the basis of any such claim is not clear. He made similar comments during the course of this preliminary hearing. Also, as I have noted, the Claimant has also indicated that he would refer Mr Phillips to the SRA, although it is not clear if he has done so.

Issues

8. The notice of this preliminary hearing indicated that the Judge would decide the following issues:

   "Should the claim or any part of it be struck out because the claimant has conducted the proceedings in a scandalous, unreasonable, a vexatious way?

   "Should the claim or any part of it be struck out because the Tribunal considers that it is no longer possible to have a fair hearing of it?"

9. Those issues boiled down to three essential questions I needed to consider:

    1. Whether the conduct asserted to have taken place occurred in fact, on the balance of probability?

    2. If so, whether that was conduct which was scandalous, unreasonable or vexatious

    3. If so, whether it was nevertheless still possible for a fair hearing to take place?

    The third point rather elides the two alternative strands of the Respondent's application, i.e., that strike-out should arise due to the scandalous, unreasonable or vexatious conduct on the one hand, or because it is no longer possible to have a fair hearing on the other hand, but the guidance from the appellate courts in relation to the assessment of conduct would require me to consider the potential for there to be a fair trial as part of my assessment of the Claimant's conduct in any event.

Law

10. The power to strike out employment tribunal claims lies in Rule 37 of the Employment Tribunals Rules of Procedure. That provides, relevantly to the application made by the Respondents, as follows:

    "*(1) At any stage of the proceedings, … on the application of a party, a Tribunal may strike out all or part of a claim … 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; …

    (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim …."

11. Sub-paragraph (2) of Rule 37 then provides that a claim 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.

12. In terms of the constituent elements of Rule 37(1)(b), the Court of Appeal noted, in ***Bennett -v- Southwark London Borough Council*** **[2002] ICR 881**, that "scandalous" is not a synonym for "shocking", but instead, as noted by Sedley LJ at paragraph 27, embraces "*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.*".

13. "Vexatious" appears only to have been considered in the context of the vexatiousness of a claim itself rather than the way in which it was conducted. In that regard. It was described in ***ET Marler Ltd -v- Robinson***

[1974] ICR 72, as the bringing of a "*hopeless claim, not with any expectation of recovering compensation, but out of spite to harass his employers, or for some other improper motive.*".

14. "Unreasonable" has been understood from, the unreported case of ***Dyer -v- Secretary of State for Employment*** **(UKEAT/ 183/83)**, as to be construed by reference to its normal English construction, and is not to be interpreted as if it means something similar to vexatious.

15. The appellate courts have made very clear however, that where a Tribunal reaches a conclusion that conduct has been scandalous, unreasonable or vexatious, it must still consider whether a fair trial is still possible. That was noted by the Employment Appeal Tribunal ("EAT") in ***De Keyser Ltd -v- Wilson*** **[2001] IRLR 324**, and then affirmed by the EAT in ***Bolch -v- Chipman*** **[2004] IRLR 140**, where, at paragraph 55, the Appeal Tribunal noted the steps that a Tribunal must ordinarily take when determining whether to make a strike out order as follows:

    1. Before making a strike-out order, an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings.

    2. Once such a finding has been made, the judge must consider whether a fair trial is still possible, as, save in exceptional circumstances a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.

    3. Even if the conclusion is reached that a fair trial is unachievable, the tribunal will still 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 by striking out the claim or response,

16. The Court of Appeal provided additional guidance on strike-out applications in the case of James -v- Blockbuster Entertainment Ltd **2006 IRLR 630**, where Sedley LJ said, at paragraph 18:

    "*The first object of any system of justice is to get triable cases tried. … There can be no doubt … that Mr James has been difficult, querulous and uncooperative in many respects. … But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably.*"

Findings

17. The findings of fact I made relevant to the issues I had to decide, reached on the balance of probability where there was any dispute, were as follows.

18. Much of the factual background to the Respondents' application has already been recited in my chronology of events above. Indeed, all of the factual matters in this case, bar the initial telephone discussion between the Claimant and Mr Phillips, and the discussion of that telephone discussion before Judge Harfield, was contained in emails sent by the Claimant, about

which there could be no dispute as to what was said. My focus therefore was on the discussion on 21 November 2023 between the Claimant and Mr Phillips, and on the subsequent discussion before Judge Harfield on 1 December 2023.

19. With regard to the former, the Claimant's position has slightly varied. Some of his references to the call seemed to indicate that he considered that it simply had not taken place. However, in a later email to Mr Phillips on 17 June 2024, the Claimant indicated that he had never said that the call had not happened, and that was his position before me during the course of this hearing.

20. Mr Phillips, as an exhibit to his witness statement, provided a copy of his mobile phone call log for 21 November 2023, which showed that he had received a call from the Claimant at 08:32, which he had not answered. It then showed that Mr Phillips had attempted to call the Claimant's number, also at 08:32, with the call being timed at seven seconds, indicating that it either could not be connected or was not answered. There was then a further call to the Claimant's number, again at 08:32, with the call being timed at three minutes, which indicated that a discussion had taken place.

21. Ultimately, despite, as I have noted, the Claimant's approach to the call being somewhat equivocal, Mr Phillips' call log appeared broadly to accord with the Claimant's perspective of the call, as he accepted before me during this hearing that there had been a call of something approaching three minutes in length.

22. In relation to the content of the call, Mr Phillips produced a near-contemporaneous file note of the conversation, made later on the same day. In that, he noted that the discussion with the Claimant had covered possible settlement, the evidence that the Claimant had which he considered would support his case against the Respondents, and, in response to a point Mr Phillips made that it would be helpful for the Claimant if he obtained some legal advice, an indication that the Claimant had already obtained that advice. Mr Phillips' note of the call indicates that it concluded by the Claimant, saying that he would take Mr Phillips to court "*once this was done*", that Mr Phillips then queried what the Claimant would take him to court for, and that the Claimant then hung up on the call.

23. I was satisfied from the documentary evidence provided that the content of the conversation had taken place as Mr Phillips described it. His account was also consistent with his reason for bringing the discussion to the attention of Judge Harfield, i.e. that the Claimant had indicated that he would take Mr Phillips to court, which I could understand Mr Phillips would have found disturbing.

24. Turning to the discussion before Judge Harfield, the Claimant was adamant that the recording of the hearing would vindicate his perspective of events, i.e. that he had not accused Mr Phillips of effectively lying in his description of the call. However, despite having been provided with the appropriate form to apply for a transcription of the hearing by the Employment Tribunal staff on 21 May 2024, which had been provided on the appropriate yellow background to take into account the Claimant's needs, the Claimant did not

return the form until he sent an email to the Employment Tribunal during the course of this hearing, at 11:30am. No transcription of the hearing before Judge Harfield was therefore before me.

25. Assessing the evidence as best I could, I was satisfied that the Claimant had effectively accused Mr Phillips of lying about the telephone discussion on 21 November 2023. I doubted that Judge Harfield would have phrased her preliminary hearing summary in the way that she did if a matter of some importance had not been raised, which led to Judge Harfield, noting that she had had a discussion about the need, notwithstanding the Claimant's status as a litigant in person, to separate out a lawyer such as Mr Phillips from the Claimant that he was representing or that client's case.

26. I further noted that the Claimant, later on the same day of the preliminary hearing, had sent an email to Mr Phillips, asking him to "*cease and desist [his] fabrication of the phone call*", and similarly referred to an assertion that Mr Phillips had fabricated his record of the call in several subsequent emails. That would therefore be entirely consistent with Mr Phillips' contention that the Claimant had stated before Judge Harfield that Mr Phillips had lied in his description of the call on 21 November 2023, when he said that the Claimant had said that he would take Mr Phillips to court. That is again something that the Claimant has referenced on several occasions, and indeed referenced again during the course of this hearing.

Conclusions

27. Taking my findings and the applicable legal principles into account, I had little difficulty in concluding that the Claimant's conduct of these proceedings had been scandalous and unreasonable. That was in the form of his threat to Mr Phillips to pursue litigation against him, and his continued assertions that Mr Phillips had lied in the hearing before Judge Harfield when referencing that threat. Indeed, whilst this preliminary hearing had been adjourned for me to reach my decision on the Respondents' application, it was brought to my attention by the Respondents' representative that the Claimant had made further references to the issue in his witness statement for the final hearing, to which access had only been gained by the Respondents during this hearing, following the provision by the Claimant of the appropriate password.

28. In my view, the assertion, or even the implication, that Mr Phillips had lied was misplaced, and was without foundation. The allegation was therefore, one which was abusive of the other side's representative. It was also irrelevant to the issues to be addressed at the final hearing. In that regard, I noted that even if Mr Phillips had been wrong about what the Claimant had said to him during the discussion on 21 November 2023, and, to be clear, I do not consider that he was, that would have had no bearing at all on the Claimant's case against the Respondents.

29. As well as concluding that the Claimant's conduct was scandalous, I also considered that it was unreasonable in the ordinary sense of that word.

30. However, I did not get the sense that the Claimant was being vexatious, or in any way vindictive, in making the allegation that he did, and in repeating

it. I noted that the Claimant suffers from a visual processing disorder, also known as a sensory processing disorder, and the impression I gained from him today, and from reading the documents he has produced, was of someone who can get inappropriately drawn into a focus on perceived wrongdoing, which is fundamentally misplaced, both in relation to what actually happened, and to the actual relevance of what happened to the claims being brought in any event. I noted in that regard the Claimant's consistent references to considering that Mr Phillips lied when he raised with Judge Harfield the threat the Claimant had made to take legal proceedings against him, and the Claimant's repeated indications, reiterated before me during this hearing, to do precisely that without, as I have noted, appearing to have any legal basis to do so.

31. Having concluded that he Claimant had conducted proceedings scandalously and unreasonably, I then needed to consider whether a strike out order was appropriate, i.e. whether a fair trial could still be held. I closely considered Mr Pollitt's submissions on behalf of the Respondents which focused on two areas. He first noted what he described as the Claimant's proven willingness to be willing to lie to the Tribunal in relation to his exchanges with Mr Phillips, and contended that that must call into question his reliability as a witness at the final hearing.

32. Mr Pollitt also noted the complaints that the Claimant had made about Employment Judge Moore and Regional Employment Judge Davies, asking how any judge could be expected to hear the Claimant's claims without fear of reprisal if he did not succeed.

33. As far as the former point was concerned, I bore in mind my conclusion that the Claimant appeared to me to be someone who has consistently operated under a misapprehension about the events that had taken place, and also to be someone who had inappropriately inflated the relevance and importance of the events, whether they in fact happened as described or not. As I have noted, he is someone who suffers from a processing disorder, and I took that into account as a possible explanation for his behaviour.

34. In addition to that, the Employment Tribunal at the final hearing will be able to consider the Claimant's evidence in relation to his claims against the Respondents and the events that are alleged to have happened in the workplace, and the Respondents' representative may make submissions about the potential lack of reliability of that evidence. I did not consider that the Tribunal at the final hearing would be under any material difficulty in undertaking its usual task of weighing the evidence it reads and hears, taking into account the parties' submissions, and then in reaching reasoned conclusions in respect of the claims.

35. Finally, with regard to Mr Pollitt's second point, I noted that the judicial oath requires judges to do right by all manner of people, "*without fear or favour*". Making decisions without fear of reprisal from a party if the decision is not how they want it to be, simply goes with the territory of being a judge or forming part of an employment tribunal. It would not justify a conclusion that a fair trial could not be held.

36. Overall, and despite my conclusions about the way the Claimant has conducted elements of his case, I did not consider that a fair trial could not be held of the Claimant's claims against the Respondents. I therefore concluded that his claims should not be struck out.

Employment Judge S Jenkins
Date: 8 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON 11 July 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

Notes

Public access to employment tribunal decisions
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.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/