EMPLOYMENT TRIBUNALS

Claimant: Mr D Taheri

Respondent: Wren Living Limited

HELD AT: Manchester **ON:** 25 July 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person (by telephone)
Respondent: Mr B Williams, Counsel

JUDGMENT

1. The application for permission to amend the claim to introduce a complaint of direct race discrimination is refused.

2. The claim is struck out pursuant to rule 37(1)(a) because it is vexatious.

REASONS

Introduction

1. This preliminary hearing was listed on the instructions of Employment Judge Ross and notified to the parties by letter of 23 June 2017. It was listed to consider an application to strike out the claim made by the respondent in a letter of 9 June 2017, and to consider any case management issues if the case was not struck out.

2. The respondent was represented by counsel. The claimant asked by email of 23 July 2017 to be allowed to participate via telephone as he has now moved to Llanelli. On 24 July 2017 Employment Judge Horne refused to convert the hearing to a telephone hearing, because it needed to be held in public given the application to strike out the claim, but later that day I decided that the claimant could participate by telephone if he so wished. He did.

3. To facilitate his participation I sat at the end of the judicial bench and Mr Williams sat at the witness table next to it. The telephone was on the desk between us with the claimant on the speaker. At the outset of the hearing I explained to the claimant that he should let me know if there was anything said he did not hear properly. Both the claimant and Mr Williams assisted me by not interrupting each other and I was satisfied that both parties heard what the other said and were given a chance to respond.

The Proceedings To Date

4. In order to put my judgment into context it is necessary to summarise the proceedings so far.

5. The claimant underwent early conciliation through ACAS between 10 March and 15 March 2017, and presented his claim form on the same day as ACAS issued the early conciliation certificate. He brought a sole complaint of age discrimination based on his unsuccessful application for a post as a kitchen designer at the respondent’s Swansea store. Following a telephone interview, he attended in person for a second interview on 28 February 2017. It was conducted by the Assistant Manager, Ms Vaatstra. He was informed the following day that he was unsuccessful. Further information was given to the claimant on 2 March 2017. The claim form asserted that the real reason for not appointing him was his age, the claimant being aged 57 at the time. His claim form said that the Assistant Manager was in her early 20s and he felt he had been rejected because he had a strong personality and because of his age.

6. The claim form gave the address for the respondent at its Head Office on Humberside and the case was allocated to the Regional Office in Leeds. The claimant subsequently applied for it to be transferred to the North West region based in Manchester because his home address was in Rossendale, and transfer was approved in May 2017.

7. In the meantime the respondent filed its response form on 20 April 2017. It said that the reason the claimant was not offered the role was solely due to his performance at interview. Any age discrimination was denied. It asserted that the contemporaneous notes of the interview kept by the Assistant Manager recorded concerns about the claimant's suitability. It said that none of the external candidates were offered the role and therefore there was no less favourable treatment because of age. The response form ended with an indication that an application would be made to strike out the claim on the basis that it had no reasonable prospect of success.

8. The case had been listed for a preliminary hearing in Leeds on 2 May 2017 but that hearing was cancelled and instead Employment Judge Burton issued written Case Management Orders on 1 May 2017 (“the CMOs”). The CMOs required disclosure of all documents (including evidence of a search for work by the claimant) by 17 May 2017, preparation of a bundle by the respondent by 31 May 2017, and exchange of written witness statements by 14 June 2017. The CMOs made it clear that the claimant had to provide a witness statement containing all the evidence he proposed to give at the hearing.

9. On 8 June 2017 notice of a final hearing on 15 August 2017 was sent to the parties.

10. By a letter of 9 June 2017 the respondent applied for an order striking out the claim. It asserted that the claimant had not provided any documents as the CMOs required, and indeed that he had asserted in email correspondence that he did not have to provide any evidence to the respondent. Copies of that email and others were attached. Reliance was also placed upon threats made by the claimant to disclose matters to the BBC, which were said to be scandalous and vexatious. It also asserted that he was guilty of unreasonable conduct in making continued demands for settlement of the claim without any foundation for doing so.

11. On 15 June 2017 the respondent notified the Tribunal that it had provided three witness statements to the claimant in accordance with the timetable in the CMOs, but that he had not provided any witness statements.

12. Notice from the Tribunal of 23 June 2017 listed a preliminary hearing for 17 July 2017 to consider the application made on 9 June 2017. That hearing was postponed on the application of the claimant because he said he was on holiday. The date was changed to 25 July 2017.

13. On 29 June 2017 the respondent wrote to the Tribunal providing copies of further emails from the claimant. It sought an "Unless Order" in relation to provision of his evidence and documents.

14. In response the claimant asked for the preliminary hearing to be vacated and for his case to proceed to the final hearing. By letter of 6 July 2017 Employment Judge Holmes refused that request and confirmed that the application for an Unless Order would be considered at the preliminary hearing as well.

15. Once the new date was confirmed the claimant corresponded with the Tribunal asking for it to be conducted by telephone. The outcome was as indicated above. The notification that the hearing would proceed but that he could participate by telephone was sent by email to him at 12.17pm on 24 July 2017.

16. At 13.26pm the same day the claimant emailed the respondent (copying his email to the Tribunal) saying:

> **"I have an Archive Folder on my Laptop with all my Jobsearch but this cannot be downloaded and will be available to view at a Full Hearing."**

17. His email went on to set out in eleven numbered paragraphs his witness statement. He maintained that the real reasons for his rejection were discriminatory. He intended to cross examine the respondent witnesses. His statement contained the following passages:

> **"(6) Ms Vaatstra was 25 years old with limited management experience and the fact that she has extensive Tattoos on both arms did not phase me as I have worked [**with**] all types of people from all ages.**
>
> **(7) It is my belief that her interview techniques were flawed and she deliberately took a dislike to me because of my age and experience. In addition it may well be a case of discriminating against me because of my ethnic background."**

18. The hearing considered some case management issues and the reference in the witness statement to race discrimination before dealing with the application to strike out. I will record those matters in order.

Case Management Issues

Venue for the Hearing

19. The claimant confirmed that he is now living in Llanelli with his partner. Later on in the hearing he gave his new address and that is recorded on the Tribunal file. He confirmed, however, that his address in Rossendale should remain his postal address as arrangements had been made for his mail to be forwarded.

20. He wanted the proceedings transferred to South Wales. Mr Williams objected. The respondent is not calling the Assistant Manager (who has left the company) and the other witnesses are based in Humberside. After discussion we reached a position whereby the respondent was going to consider whether to offer to pay for the claimant to travel to Manchester for the final hearing in return for the proceedings remaining in the North West region. No final decision on the venue for the hearing was made.

Claimant's Witness Statement

21. Mr Williams took issue with the content of the claimant's witness statement, but it seemed to me that it complied with what Employment Judge Burton had ordered, even though it had been served late. It set out in essence the factual content of the claimant's case, such as it was.

Claimant's Failure to Disclose Documents

22. The claimant had not disclosed the archive folder showing his efforts to find work. During the discussion it became apparent that it would be possible for him to provide a copy to the respondent electronically even though he did not at present know how to do that. It was agreed in principle that he would be ordered to do so by 8 August 2017, with the sanction for failing to do that being that remedy would be split from liability so that a further hearing would be necessary if his claim succeeded.

23. The claimant confirmed that he had a video of the interview with the Assistant Manager which he had covertly recorded. It had not previously been disclosed to the respondent. He said it could be disclosed without delay and in principle I was minded to make an unless order striking out the claim unless he disclosed it by 4.00pm on Tuesday 1 August 2017.

Claimant's Non-Compliance

24. The claimant said that he had not complied with the timescale in the Case Management Orders because of "personal reasons". Despite two invitations by Mr Williams he did not elaborate on what those reasons were other than to say that they were health issues. He also emphasised that he is without work and reliant on benefits, and that he is not a lawyer and is conducting the case himself.

Application to Amend

25. I asked the claimant if he wanted the sentence in paragraph (7) of his witness statement referring to his "ethnic background" (quoted in paragraph 17 above) to be treated as an application to amend his claim form so as to pursue a complaint of

race discrimination. He confirmed that he did want that claim to be included. I treated it as an application to add to his claim form the words:

> **"The decision to refuse my application was also direct race discrimination."**

26. I outlined to him the legal position. The Tribunal has power to permit or refuse an application to amend. That power must be exercised in accordance with the overriding objective in rule 2. The leading case remains **Selkent Bus Co Limited v Moore [1996] ICR 836**. The Tribunal must take account of all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances include the nature of the amendment, the timing and manner of the application, and the applicability of time limits. The merits of the proposed amendment can also be relevant.

27. Having heard from the claimant I considered the relevant factors. This was a significantly different way of putting his claim. It was not simply a technical re-labelling of the existing claim. Further, it would require additional pleading and evidence from the respondent. The respondent had offered in its response form (and presumably addressed in its witness statements) information about the age composition of its workforce. There was nothing about ethnicity. This was therefore a substantial amendment pleading a new cause of action.

28. The timing of the application was a concern. It was made after witness statements had been served. The final hearing was listed for 15 August 2017. There was no explanation offered for why it had not been raised any earlier.

29. Further, the manner in which it was made was unsatisfactory. It was a passing remark in the claimant's witness statement. It did not on the face of it explain his case and I had to elicit from him during the hearing that he is a UK national whose parents are from Iran and who regards himself as looking Middle Eastern rather than British. He asserted that this would have been visible to the Assistant Manager when she interviewed him.

30. Importantly I was very concerned about the application of time limits. The decision to refuse his application was communicated on 29 February 2017. Time to complain of race discrimination therefore expired on 28 May 2017, albeit extended by a few days because of early conciliation to early June. The application was made approximately six weeks outside the three month time limit. Mr Taheri did not identify any grounds on which it would have been just and equitable for that time limit to have been extended. There was nothing which had prevented him from making this allegation on his original claim form. No new fact had been discovered which had caused him to change his view.

31. I also took into account the merits of the case for race discrimination. The way in which it appeared in the witness statement (quoted above) strongly suggested that it was simply a possibility in the mind of the claimant and that he had no evidence that would help him shift the burden of proof to the respondent in a race discrimination complaint. It appeared that he had simply alighted upon his ethnicity as another protected characteristic which might give him a claim over which the Tribunal would have jurisdiction. Even bearing in mind the effect of the burden of proof provision in section 136 Equality Act 2010 (the claimant need only prove facts from which the Tribunal *could* conclude that there has been discrimination), there was no evidence to back up the allegation.

32. Putting these matters together I decided that the balance of prejudice and hardship favoured refusing the application. It was out of time for no good reason. There was no evidence to support it. If it were allowed the respondent would be put to additional expense and the need to obtain information about the ethnicity of the applicants for the role (and possibly of its employees) would almost certainly cause a postponement of the final hearing. There would be more cost which the respondent was unlikely to recover from the claimant. The application for permission to amend was refused.

Application to Strike Out – No Reasonable Prospect of Success

33. In the letter of 9 June 2017 the respondent mentioned that it had made an application to strike out the claim on the basis there was no reasonable prospect of success on two occasions: 18 and 23 May 2017. Neither email was on the Tribunal file.

34. Employment Judge Ross had directed that this hearing consider the application on other grounds. Mr Williams accepted that this was so and did not seek to pursue that application.

Application to Strike Out – Vexatious Claim and/or Unreasonable or Vexatious Conduct and/or Non-Compliance with Case Management Orders

35. Having dealt with the matters summarised above I heard and determined the application made in the respondent's letter of 9 June 2017. The remainder of these reasons is concerned with this application.

36. Because the claimant was participating by telephone Mr Williams made his submission on each point individually, and the claimant had an opportunity to respond before Mr Williams moved onto the next point. Once we had addressed all the points Mr Williams summarised his case and the claimant responded. I gave brief oral reasons and what follows is an explanation in more detail of my reasoning.

37. It is right to record that Mr Williams raised two matters where the claimant denied the factual basis of the allegation and Mr Williams withdrew those matters. They related to CVs and an attempt to deliver papers to the claimant on 19 May 2017. I disregarded those matters. The remainder of the factual material on which I based my decision was either matters which the claimant acknowledged during the hearing, or facts which were a matter of record from the Tribunal file. I was not provided with any documents by either party other than what appears on the Tribunal file.

Relevant Legal Framework

38. The power to strike out a claim arises under rule 37 of the Employment Tribunals Rules of Procedure 2013. That power must be exercised in accordance with the overriding objective in rule 2. Rule 37(1) provides as follows:

> **"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:-**
>
> **(a) That it is scandalous or vexatious or has no reasonable prospect of success;**

(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;**

(c) **For non-compliance with any of these Rules or with an order of the Tribunal;**

(d) **…**

(e) **…"**

39. The meaning of the word "vexatious" has been considered by the courts on a number of occasions. In **ET Marler Ltd v Robertson [1974] ICR 72**, the word was used of a claim pursued not with the expectation of success but to harass the other side or out of some improper motive. In **Attorney General v Barker [2000] 1 FLR 759**, Lord Chief Justice Bingham described it as a familiar term and said that the hallmark of a vexatious proceeding was that it had:

> **"Little or no basis in law (or at least no discernable basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."**

40. The Court of Appeal considered this in the context of an employment claim in **Ashmore v British Coal Corporation [1990] ICR 485** and said that whether a case was vexatious depended on all the relevant circumstances of the case. Considerations of public policy and the interests of justice may be very material. According to Stuart Smith LJ (at page 499 A) case can be an abuse of process without necessarily being "a sham and not honest and not *bona fide*."

41. There is a need for particular sensitivity in discrimination complaints. In **Anyanwu v South Bank Students Union [2001] IRLR 305** the House of Lords said that such claims should not be struck out as an abuse of process except in the most obvious and plainest cases. Lord Steyn went on to say:

> **"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."**

42. That warning reflects the reality that in direct discrimination cases there is frequently no direct evidence available to a claimant of the relevant protected characteristic (in this case, age) having been in the mind of the decision-maker. A finding of direct discrimination may therefore depend on the inferences to be drawn from primary facts. That is why such cases are termed "fact-sensitive". Striking them out before the evidence is heard is not generally appropriate.

43. Where the Tribunal concludes that the manner in which proceedings have been conducted is scandalous, unreasonable or vexatious under rule 37(1)(b), or if it satisfied that there has been a failure to comply with case management orders under rule 37(1)(c), it does not follow that the claim should be struck out. There still remains the paramount consideration of whether a fair trial is possible. If a fair trial is possible the sanction for breach of those sub-rules may be less than striking out (e.g. an order for costs). Where the whole claim is vexatious under rule 37(1)(a), however,

a fair trial is inherently impossible because the whole proceedings are an abuse of the Tribunal's processes.

Findings of Fact

44. Based on matters recorded on the Tribunal file and what the claimant accepted during this hearing, the facts relevant to the application are as follows. Where appropriate I have recorded in quotation marks what the claimant said during the hearing.

45. The claimant pursued his application promptly. He was informed on 29 February that he had not been successful and was given further details on 2 March. He contacted ACAS to undergo conciliation on 10 March, and his claim form was presented on 15 March 2017.

46. The claimant had covertly videoed his interview with the Assistant Manager. He did not tell the respondent he was going to do that. He does not routinely film his job interviews, but online research had shown him that the respondent was viewed in some quarters as having a "hire and fire mentality" which "raised alarm bells" for him. He explained that he wanted to "cover all the bases in case there was any ambiguity or if anything said in the interview was later denied".

47. The claimant failed to comply with Employment Judge Burton's order to disclose all documents relevant to the issues in the case by 17 May 2017. He did not disclose the film of the interview to the respondent. He did not provide the respondent with copies of the records of his search for work. In an email of 31 May 2017 he told the respondent that he did not have to supply in advance any evidence he may wish to rely on (see below). He said in my hearing that his failure to comply with this Case Management Order was due to "personal reasons".

48. Similarly the claimant failed to comply with the order to provide his witness statement by 14 June 2017. He gave the same explanation. He only provided his witness statement in an email of 24 July 2017 shortly before 1.30pm having been advised by the Tribunal just over an hour earlier that the hearing would proceed and that he could participate by telephone.

49. The claimant has on a number of occasions made threats by email to the respondent pressuring it to settle his case. On 23 May 2017 at 12.42pm he emailed the respondent in the following terms, copying his email to the BBC consumer programme "Watchdog":

> **"I have all the evidence on film and I am considering sending this evidence to BBC Watchdog. Please advise your clients to settle the case now before the reputation of the company is tainted by further adverse publicity."**

50. In my hearing the claimant confirmed that he has since sent the film to BBC Watchdog.

51. On 30 May 2017 he emailed the respondent in the following terms, again copying it to BBC Watchdog:

> **"Please tell your clients to make an offer of settlement as there is no question of them ever receiving any costs as they have choose [**sic**] to ignore my attempts at mediation. They cannot bully me in any way but I am in contact with BBC Watchdog as they are**

> **very interested in the evidence I have in my possession. This is the last chance your clients have to settle otherwise I will hand over the evidence to Watchdog and I will also hold a press conference at the Tribunal in Manchester to highlight the questionable ethics and unprofessional practices of Wren Kitchens."**

52. On 31 May 2017 he sent an email in the following terms, again copied to BBC Watchdog:

> **"I don't have to supply you with any evidence I may wish to rely on. As previously stated please advise your clients to settle the case now and save all of us time and money."**

53. The claimant accepted in my hearing that on about four occasions in the last couple of months he has set up appointments with kitchen designers at the Swansea store using the respondent's website, then not attended those appointments. Mr Williams suggested that this was a fiendish attempt to harass and vex the respondent. The claimant denied any such intent. He said he want to see how the respondent marketed itself and how it operated. He was investigating what sort of company it is and said he was "building a case". There had been no contact with any of the witnesses in the case. Mr Williams suggested that the claimant was simply deliberately wasting the respondent's time, to which the claimant responded by saying that his time had been wasted in his travel to Swansea for the interview at which he was unsuccessful. He said:

> **"They gave me excuses – nonsense excuses. They have wasted my time. I only brought this case because they wouldn't pay my expenses."**

Discussion and Conclusions

54. I did not consider it appropriate to strike out the proceedings because the manner in which they were conducted was unreasonable or vexatious, or because the claimant had failed to comply with Case Management Orders. Those matters alone did not justify striking out the case. A fair trial remained possible with the Case Management Orders that had been discussed earlier in this hearing.

55. However, I decided that a combination of factors showed that this case was vexatious and should be struck out under rule 37(1)(a). The claimant was not bringing it because he genuinely believed that there had been age discrimination. The age discrimination allegation was just a convenient device to give the Tribunal jurisdiction so that he could put pressure on the respondent to offer him compensation. I reached that conclusion because of the combination of the following factors.

<u>Use of the Video Recording</u>

56. Firstly, the decision to create a covert video recording of a job interview was surprising in itself, but the failure to disclose it to the respondent was even more troubling. In my judgment the claimant knew it was relevant given that it was a record of what the alleged discriminator said and did during the interview. His reference to it in his email of 23 May showed as much. It should have been disclosed by 17 May 2017.

57. Further, his email of 23 May 2017 quoted in paragraph 49 above was absolutely plain: the existence of the film was used as a device to put pressure on the respondent to pay out in order to avoid adverse publicity. Not only had he

decided not to comply with the CMOS, he was seeking to use his deliberate withholding of evidence as a negotiating tactic.

General Non-Compliance

58. Secondly, the failure to comply with Case Management Orders in relation to other documents and the witness statement was consistent with an intention to use the litigation as a device to obtain payment rather than to obtain an adjudication of his complaint on the merits. Despite the very clear terms of the CMOs the claimant emailed the respondent on 31 May saying that he did not have to supply any evidence and that the respondent should settle the case now to save time and money. I am satisfied that was a deliberate disregard of the CMOs for the purposes of obtaining a settlement of the claim irrespective of the merits of the case. It was also significant that he only sought to comply with the CMOs on the eve of this hearing about an hour after confirmation from the tribunal that it was going ahead.

False Appointments

59. Thirdly, the repeated appointments arranged with the respondent which the claimant did not attend was consistent with a vindictive approach of causing the respondent trouble and expense. I did not accept the claimant's explanation that he was seeking to build an overall picture of way the company operates as background to this litigation. The way the company operates in relation to potential customers had no bearing on the recruitment decision made at the end of February 2017, and I did not accept that the claimant thought it would. That was evident, I concluded, from the claimant's response to Mr Williams' suggestion that he was deliberately wasting the respondent's time as quoted in paragraph 53 above.

Threats of Publicity

60. Fourthly, the repeated efforts by the claimant to pressure the respondent into settling the case also betrayed his true intention in bringing it. They went beyond reasonable attempts to resolve a genuine dispute by resorting to threats of publicity and reputational damage. They were coupled with a theme of the claimant having evidence which he was withholding. His reference to holding a press conference at the Tribunal in Manchester was wholly inappropriate. All these approaches were explicable by a desire to use the litigation as a means of obtaining payment, not because his case had merit, but because of potential reputational damage to the respondent.

Merits of the Case

61. Fifthly, I took into account the merits of the case. The claim form did not identify anything which in my judgment would shift the burden of proof to the respondent. It did nothing more than say that because the claimant did not accept the reasons given for his rejection (relating to his performance at interview), the real reason must have been his age. The fact that he is 57 and that his application was unsuccessful is not sufficient to shift the burden of proof to the respondent: see **Madarassy v Nomura International PLC [2007] ICR 867**. Indeed, the Employment Appeal Tribunal has observed that cases which do no more than plead a difference of treatment and a difference of protected characteristic can be struck out as having no reasonable prospect of success: **Chandhok v Tirkey [2015] IRLR 195** at paragraph 20.

62. There were also two indications that the claimant knew full well that his case had no merit. The first was his belated attempt to introduce a race discrimination complaint in his witness statement. I asked him during the hearing what evidence he had that race played a part in the decision to refuse his application and he said he had no evidence at all and it could just be speculation on his part. It was another attempt to put more pressure on the respondent.

63. The second was his response to my question about the evidence for age discrimination. All he said was that he felt there had been discrimination and it was his word against the company's. He made references to wanting to cross-examine the respondent's witnesses but did not identify any evidence he could put to them save for his bare assertion it was because of age. Indeed, from the fact he had not disclosed the film to the respondent I inferred that nothing in the film would support his case on age discrimination. The claimant did not suggest otherwise.

Summary

64. None of these matters in isolation would have justified striking out the case (unless there had been an application based on the proposition there was no reasonable prospect of success) but together they created a clear picture of a vexatious claim. I concluded that the claimant did not believe that he was the victim of age discrimination; at best all he was doing was asserting his frustration that he did not accept the reasons given for rejecting his application. He alleged age discrimination to give him an opportunity to litigate so as to pressure the respondent into an out of court settlement. That was evident from his conduct beginning with the decision to withhold the film of the interview; the complete disregard of CMOs until the eve of this hearing; the attempts to persuade the respondent that it would not get sight of his evidence before the hearing; the reference to having a film which had not been disclosed but which would be provided to the BBC; the threats of publicity and a press conference, and the reality that he did not believe his own case had merit. The impression that he was bringing the case for the improper purpose of vexing the respondent to obtain a payout was supported by the kitchen design appointments which he did not attend.

65. These proceedings were consequently vexatious and an abuse of process, and I struck them out.

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Employment Judge Franey

27 July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 August 2017

FOR THE TRIBUNAL OFFICE