Case No: 2204787/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms K Kaler

Respondents: 1 Barabara Quartey
2 Zoe Wilson
3 Zoe Poullos
4 Bora Anvi
5 Anna Macey
6 Insights Esc Ltd

Heard at: London Central **On:** 13 January 2020

Before: Employment Judge H Grewal

Representation

Claimant: In person

Respondents: Ms A Macey, Counsel

JUDGMENT

1 The Tribunal does not have jurisdiction to consider the complaints against the First, Second and Fifth Respondents in relation to their conduct in defending case number 2201864/2018;

2 The Tribunal does not have jurisdiction to consider the complaints against the Sixth Respondent because the Claimant is estopped from pursuing them.

3 All claims against the First, Second, Third and Fourth Respondents are struck out.

4 The Claimant is to pay the Respondents' costs in the sum of £3,500 and the Fifth Respondent £780 for her preparation time.

REASONS

1 In a claim form presented on 16 October 2019 the Claimant complained of post-termination disability discrimination, being subjected to detriments for having made protected disclosures, breach of contract and unauthorised deductions form wages. The Sixth Respondent ("R6") is her former employer, Respondents 1 to 4 are employees of R6 and the Fifth Respondent ("R5") is the lawyer who represented the R6 in a previous claim brought by Claimant (case number 2201864/2018). In respect of Rs 1 – 5 Early Conciliation was commenced and concluded on 8 October 2019 and in respect of R6 on 9 October 2019. R6 is a specialist school providing education for children with social, emotional, behavioural and mental health needs.

2 In the current claim the Claimant complained of the following:

(a) Since she left R6, Rs 1 to 4 had withheld her pay, ignored her emails and requests, sent the police to her house on three occasions, referred her to the National Council of Teaching and Learning and other professional bodies and made false statements, contacted her colleagues at her previous school, encouraged other members of staff to make false statements about her and gave her a false reference;

(b) They had done some of those acts because she had made protected disclosures in December 2017 and on 6 January 2018;

(c) Before, during and after the Tribunal hearing of her first claims Rs 1, 2 and 5 made last minute changes or demands right before the hearing and used aggressive and questioning techniques that would be stressful for an Autistic person.

3 In her first claim presented on 30 March 2018 (case number 2201864/2018) the Claimant complained of disability discrimination, unfair dismissal for making a protected disclosure, breach of contract (dismissal without notice) and unauthorised deductions from wages. That was a claim solely against R6. The Claimant was employed by R6 from 1 July 2017 to 2 January 2018. The unfair dismissal claim was dismissed upon withdrawal at a preliminary hearing on 24 July 2018. At that hearing the Claimant's application to add individual employees as respondents was refused. On 17 September 2018 the Claimant was given leave to amend her claim to include three acts of post-termination victimisation. These were that on 12 January 2018 the Respondent had referred the Claimant to the National College of Teaching and Leadership ("NCTL"), on 19 April 2018 it had delayed providing a reference to Non-Stop Education and had provided a negative reference, and on 31 May 2018 it had sent the police to her house. At a hearing of the claims on 8 July 2019 the Tribunal decided the issue of disability first. It concluded on 9 July 2019 that the Claimant was not disabled at the material time and dismissed all her complaints of disability discrimination. The Claimant was distressed and unable to continue. The remaining claims (victimisation, breach of contract and unauthorised deductions from wages) were adjourned. They were listed to be heard on 16 and 17 January 2020.

4 On 20 November 2019 the Respondents applied for this claim to be struck on the grounds that it had no reasonable prospect of success or, in the alternative for a

deposit order. On 18 December 2019 the Tribunal notified the parties that those applications would be determined at a preliminary hearing on 13 January 2020.

4 After the Tribunal office had closed on 10 January 2020 the Claimant applied for some adjustments to be made at the hearing because she is autistic. I had on the file of the Claimant's first case a report from a Clinical Psychologist who had assessed the Claimant on 12 August 2019. I read that report. The conclusion of the assessment was that she met the criteria for a diagnosis of Autism Spectrum Disorder ("ASD"). His report said that she had difficulties in communicating effectively with others, difficulties in understanding and sustaining relationships, a restrictive and repetitive pattern of behaviour, interests and activities and a number of sensory interests and sensitivities.

5 I indicated to the Claimant at the outset of the hearing that I would be able to make all the adjustments that she required other than to dim the lighting in the room. The Claimant said that that problem could be overcome if we moved the table at which she was sitting slightly. We did that. I told her that she would not be required to give evidence at the hearing and she would not be cross-examined. We adjourned from 10.45 to 11.45 to enable the Claimant and me to read the Respondents' skeleton arguments.

6 Ms Macey made submissions on behalf of the Respondents from 11.45 to 12.50. She also applied for costs. The Claimant interrupted her and me many times. On many occasions I repeated for her or explained slowly what Ms Macey was saying. We gave her lots of time to find the relevant documents. At the end of the submissions, I suggested that we took a slightly longer than usual lunch break so that the Claimant could think about her response to the submissions. The Claimant said that she wanted to withdraw her claims. I advised her not to make any rash decisions and to give the matter some thought over the lunch break. She said that she could not take it any more and that it was not worth it. She said that no one had been horrid to her and Ms Macey and I had been nice to her. She said that she was leaving and wanted me to make a decision without her input. She left. I reserved my decision.

Conclusions

Complaints about conduct of Tribunal proceedings

7 R5 is a barrister who works for solicitors and was R6's lawyer in the first claim. The claim against her is based on her conduct of those proceedings at the hearing on 8 and 9 July 2019. The complaints against her are that she made last minute changes or demands right before the hearing and used aggressive and questioning techniques. They appear to be claims of disability discrimination and/or victimisation. Those complaints are also made against R1 and R2.

8 It is well-established that the principle of immunity from suit applies to everything said and done in the course of judicial proceedings. In **Taylor v Director of the Serious Fraud Office [1998] ….** Lord Hoffman stated,

> *"the core of the principle of immunity from suit is not in doubt. By the end of the nineteenth century it was settled that persons taking part in a trial – the judge, the advocates, the witnesses – could not be sued for anything written or spoken in*

the course of the proceedings. The immunity was absolute and could not be defeated even by proof of malice."

The reason for the immunity was explained by Fry LJ in **Munster v Lamb [1883] 11 QBD 588, at 607,**

"*The rule of law exists, not because of the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in which they had not spoke with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty."*

In **Darker v Chief Constable of the West Midlands Police [2001] 1 AC 435** Lord Hope of Craighead stated obiter at 445,

"*when a police officer comes to court to give evidence he has the benefit of an absolute immunity. This immunity, which is to be regarded as necessary in the interests of the administration of justice and is granted to him as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceedings in any court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune form action that may be brought against them on the grounds that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciousy and without reasonable cause."*

9 Immunity from suit applies to the complaints that the Claimants makes against Rs1, 2 and 5 in respect of their conduct of the proceedings in the Employment Tribunal on 8 and 9 July 2019. The Tribunal does not have jurisdiction to consider those complaints.

10 If immunity from suit did not apply, the claims would have been struck out as having no reasonable prospect of success. In order for the Claimant to bring a claim against R1 or R2 she would have to establish that they were liable under section 110 of the Equality Act 2010 for R6's acts under section 108(1) or (2) of the Equality Act 2010. In order to bring a claim against R5 she would have to establish that R5 knowingly helped R6 to discriminate against her under section 108(1) and (2). Section 108 provides,

"*(1) A person (A) must not discriminate against another (B) if –*

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another (B) if –

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act."

The employment relationship terminated on 2 January 2018. I consider that the Claimant would have no reasonable prospect of arguing that the conduct of witnesses and the barrister at the hearing 18 months later of a claim brought by her "arose out of and was closely connected to" the employment relationship between her and R6.

Complaints of post-termination disability discrimination and protected disclosure detriments against Rs 1, 2, 3, 4 and 6

11 At a preliminary hearing of her first claim the Tribunal ordered the Claimant to provide further particulars of her complaint of disability discrimination/harassment. The Claimant provided the particulars on 26 July 2018. They included complaints of ignoring her emails, not paying her full pay at the end of December 2017 and things that had happened between her dismissal in January 2018 and 26 July 2018. In respect of the last category she said,

"*My employers continued to bully me after I was dismissed. This was deliberate and malicious. They sent police to my home 3 times. Twice in January, to criminalise me for harassment due to emails, despite the last email being sent in December. Twice they tried to criminalise me for stealing school property when I was already organising an exchange of property through the police. They made a referral to the National College for Teaching and Learning (NCTL) in an attempt to get me struck off from teaching … They also tried to get me struck off from teaching for sexual inappropriateness towards Bora Avni. This was later retracted. They used false witness statements which I can prove are false. I am still being investigated for this and may be struck off. This was not enough, when I finally secured another job, they delayed giving the reference and then finally gave an unfair one and the job offer was withdrawn."*

12 It is clear from that that the Claimant complained about all the acts of which she complains in this form in her previous claim. If there are any matters about which she did not complain, she could and should have complained about them in the first claim. In the first claim she complained of disability discrimination, breach of contract (dismissal without notice), unauthorised deductions from wages and victimisation against R6. Those causes of action have been dealt with in the first set of proceedings. Res judicata – cause of action estoppel – applies to those claims and the Claimant cannot pursue them against R6. The complaint of protected disclosure detriments was not made in the first claim. However, the Claimant did make a claim for unfair dismissal for having made a protected disclosure, which she later withdrew. She could have applied to include the protected disclosure detriment claims at the same time as she applied for leave to amend to include post-termination victimisation claims. Having regard to the Claimant's conduct set out below, I am satisfied that the Claimant is misusing or abusing the process of the court by seeking to raise that as an issue now when it could have been raised before and that the rule in Henderson v Henderson applies. Furthermore, the complaints of protected disclosure detriments have not been presented in time and there is no reasonable prospect of the Claimant showing that it was not reasonably practicable to have presented them in time.

13 In this claim the Claimant is seeking to pursue the claims that she made against

R6 (the employer) in the first claim against individual employees of R6. The Claimant applied to add them as respondents to the first claim on 24 July 2018 but was not successful. The claims against them are considerably out time and the Claimant would have to satisfy the Tribunal that it would be just and equitable to consider the claims of disability discrimination and victimisation notwithstanding that. In circumstances where the Tribunal did not permit her to add them as Respondents on 24 July 2018 and the second claim was presented nearly 15 months later, there is no reasonable prospect of the Claimant persuading the Tribunal that it would be just and equitable to consider them. In any event the claims of disability discrimination have no reasonable prospect of success because the Tribunal has already decided the issue of whether the Claimant was disabled at the material time. A second Tribunal would be estopped from deciding that issue again simply because the Claimant had decided to pursue the claim against individual employees rather than the employer now.

14 Between July and November 2019 the Claimant sent threatening and intimidating emails to Rs 1 – 4 and other employees of R6. It is clear from those emails that the purpose of bringing these claims against individual respondents is to intimidate them to get them to change their evidence and to persuade R6 to pay her a large sum of money considerably in excess of what her claim is worth. I set out below some of the emails.

15 On 14 August 2019 she sent an email to Rs 1, 2, 3 and 4 and others. Most of them were witnesses in the hearing on 8 July 2019. The subject of the email was "*Important for your sake!"* She informed them that she had been diagnosed with autism and went on to say,

> "*You all chose to be malicious towards a disabled person and you will face the punishment for it.*
>
> *You will be delighted to know that I will now be adding all of you as being personally and jointly and severally liable in my £4.5 million disability discrimination claim. You all bullied me for my disability and all signed false statements against me. Being liable in this way means that all your assists* [sic]*, savings and income can be sold/used to pay any judgment awarded in my favour. I will also be writing to the TDA to get each of you struck off from teaching.*
> *…*
> *I can now also contact the police about the discrimination and harassment you forced upon me, a disabled person who is extremely vulnerable and mentally unstable."*

16 On 6 November 2019 she sent an email to R2 in which she said, among other things,

> "*I have made an application against you personally and you will be liable for any compensation.*
> *…*
> *I don't know how you sleep.*
>
> *The only way I will withdraw is if you write the truth in a statement, if not, I'm going all the way. I have a solicitor now because I have the diagnosis so it is free.*

Wake up Zoe, is your job worth your career? If the claim is decided against you, I will then apply to get you struck off. Just so you know what's coming."

17 On 8 November the Claimant sent an email to Rs 1, 2, 3 and 4. The email was headed "Without Prejudice". The rule that "Without Prejudice" communications are privileged does not apply to the Claimant's emails. The principle is that where there is a dispute between the parties, any communications between them that comprise genuine efforts to resolve their dispute will not generally be admitted in evidence at a subsequent hearing of the claim. These communications were not genuine efforts to resolve the dispute. They were efforts to threaten and intimidate the Respondent to coerce it into giving the Claimant large sums of money. Even if the rule did apply this case falls within the exception which is that exclusion of the evidence would acts as a cloak for blackmail or other unambiguous impropriety. In the email she said, among other things,

"*This is the last time I am going to give you all the chance to save yourselves rather than Barbara, who we all know does not deserve it. If you don't take it and you lose the case, any money you have in the bank, any assets you jointly or individually own, I will force you to sell through a court order and you will be in debt to me…*

You have a lot to lose.

I will also apply to get you struck off from teaching if I win because I will have evidence of misconduct. I will also go to the papers and make a point of pointing out that ZW's husband and brother are police officers and used their influence to assist you all.
…
If you agree to write a truthful statement which proves that I did tell you about my autism and I was in fact bullied, etc, I will withdraw my claim against you personally…

If you don't tell the truth, you will have a year long court case which you and both [sic] *know, you are 99% likely to lose. I will then get a CCJ on your house and then an order of sale. If you don't own a house, you will still get a CCJ which means no mortgage or credit will be available to you until such time as you pay and I agree to remove the CCJ. I will also send bailiffs to your home address, which you will have to disclose to me at the preliminary hearing next month. I will send the bailiffs to the school too."*

18 On 8 November 2019 the Claimant sent R1 an email in which she said,

"*If I win, I am not going to stop until I put you in jail. This case will prove you are a liar and that will open up a massive can of worms. Once I prove you lied, I will get you struck off from teaching which will be in the papers. Then I will get your Queen's Citizen and OBE (or MBE or whatever you scammed) stripped from you. That will also make the papers. Then I will get OFSTED involved which result* [sic] *in your school being closed. Then I will get Inland Revenue to investigate you and surely that will bring up something, after all you do have over 10 companies in your name at various addresses. Then I will go to the church that you are a trustee of and inform them. Your children will be ashamed of you!*
…

The claim is for 4 million and I'm likely to get at least half if not all. You know I have evidence for everything. You will have to sell the buildings and your home, maybe your daughter's too.

…

If you pay me £750,000 straight into my bank account by 28/11/2019, this email is confirmation that I will never ever disclose anything about this to the public or anyone in your employ and will not intentionally engage in any activity that would bring the school or you into disrepute.

…

I have looked at all your company accounts in detail as am aware your [sic] *separately own that big house as well as the property in Actin and your daughter's house.*

Maybe she will go to jail too!

…

Don't just react, think – jailtime or money?"

This email was also headed but for the reasons given previously it too is not genuine "without prejudice" discussions and not covered by the rule that it should not be disclosed.

19 Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides,

"*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, vexatious or has no reasonable prospect of success; (b) that the manner in which 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."

20 For the reasons given above, I am satisfied that the claims against Rs 1- 4 are scandalous, vexatious and unreasonable and that the Claimant has conducted proceedings in a scandalous, vexatious and unreasonable manner and that the claims have no reasonable prospect of success and that in all the circumstances it is appropriate to strike out the claims.

Costs

21 R5 applied for a preparation time order for £780 (£39 x 20 hours). All the other Respondents were represented by Mr Macey (R5) and they applied for their costs of £3,500 (the costs of drafting their grounds of resistance and representing them at this hearing). On 12 November 2019 R5 sent the Claimant a "Without prejudice save as to costs email.". She warned her that the claims did not have any prospect of success and that if she proceeded with them the Respondents would seek their costs. She set out in some detail why the claims would not succeed and why it was very likely that the Tribunal would award costs. She was advised that if she withdrew the claims at the end of that week, the Respondents would not apply for costs.

22 Rule 76(1) of the Employment Tribunals Rules of Procedure 2013 provides,

"*A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so where it considers that –*

(a) A party (or that party's representative) has acted vexatiously, absusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted, or

(b) Any claim or response had no reasonable prospect of success…"

In deciding whether to make a costs order, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay (rule 84). I had no evidence about the Claimant's ability to pay because she left before the end of the hearing.

23 For the reasons given above. I consider that the claims had no reasonable prospect of success and that the Claimant acted vexatiously, abusively and otherwise unreasonably in bringing them. She meets the threshold for an order being made against her but I still have a discretion as to whether I should make a costs order and, if so, the amount of the order. I took into account that she was warned that these claims would not succeed and that the Respondents would be seeking a costs order. The bringing of proceedings against witnesses to put pressure on them to change their evidence and threatening them in the way the Claimant did is reprehensible conduct for which there can be no excuse. I am aware that the Claimant has mental health problems but there is nothing in the medical evidence that indicates that that behaviour is attributable to any medical condition. I am satisfied that it is appropriate to make the orders sought, and I do so.

Employment Judge Grewal

Date: 10 Feb 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/2/20

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FOR THE TRIBUNAL OFFICE