Case Number: 2301512/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr O Ezeh **Claimant**

AND

John Lewis PLC **Respondents**

ON: **18 September 2020**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr D Hobbs, Counsel**

JUDGMENT

1. The Claimant's claim is struck out pursuant to Rule 37(1)(b) Employment Tribunal Rules 2013.
2. The Respondent's application for costs is refused.

Reasons

Introduction

1. By a claim form presented on 26 April 2018 the Claimant, Mr Ezeh, presented claims of unfair dismissal and race and disability discrimination all of which were resisted by the Respondent. Case management took place in October 2018 and the issues were set and directions given for a full merits hearing. The hearing was postponed from the original hearing date in May 2019 to July

2020 due to a lack of judicial resource.

2. In the meantime, on 18 October 2019, the Claimant wrote a letter to the Respondent's solicitors, ostensibly on a without prejudice basis, following which, on 11 December 2019, the Respondent made an application to strike out the Claimant's claim. The Claimant responded to that letter on 14 January 2020. This correspondence was referred to Judge Martin who directed that an open preliminary hearing be listed to deal with the Respondent's application and preparation for the full merits hearing be suspended pending the outcome of that hearing. The preliminary hearing had been due to take place on 21 July 2020 but was further postponed to 18 September 2020, when I dealt with the application in a hearing that took place by CVP.

3. At the hearing I was referred to a bundle of documents, including the correspondence referred to in the preceding paragraph. The Claimant's letter of 18 October 2019 was heavily redacted, to remove what I assume to have been passages relevant to an attempt to reach a settlement of the claim.

4. I heard submissions from the Claimant and Mr Hobbs and was referred by Mr Hobbs to a number of authorities including Bolch v Chipman [2004] IRLR 140, Force One Utilities Ltd v Hatfield [2009] IRLR 45 and Gainford Care Homes Ltd v Tipple & anor 2016 EWCA Civ 382. Having considered the submissions and the authorities I gave an oral judgment striking out the claim. Following my judgment the Respondent made an application for costs on which I reserved my decision and the Claimant asked for written reasons for my decision to strike out his claim.

The issues for the hearing and the relevant law

5. The sole issue for the preliminary hearing was whether the Claimant's claims should be struck out on the basis of his conduct in sending the letter of 18 October 2018. The relevant rule in the Employment Tribunal Rules is Rule 37(1)(b), which provides:

> **Striking out**
>
> **37.—(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…**

The facts and submissions

6. The facts can be briefly stated. In the course of preparation for the full merits

hearing of the claim and in a letter that purported to engage the Respondent in without prejudice correspondence the Claimant set out what can properly be described as a number of threats to the Respondents and its witnesses. The witnesses in question were Mr Theodosiou, the disciplinary manager and Ms Mihell, who heard the Claimant's appeal against his dismissal.

7. The threats are contained in the following passages:

- **I have just also concluded an investigation into Annie MIHELL myself, and among other things uncovered that she has only just obtained formal paralegal qualifications in employment law. Whether this was taken to give her some credibility in front of the Tribunal, give her more confidence under cross examination or make her the scapegoat (for a decision that was passed down from the Executive team) - it will be an own goal for your Legal Team. Once she is on the stand and under cross-examination she will start contradicting herself – and eventually she will be broken. As THEODOSIOU found out during the Disciplinary Hearing I was well trained during my time in the Nigerian Military/ Security Service (see below) to make any interrogation work in my favour**.

- **Someone within the Executive Team or Board of Directors authorised the termination of my Contract - and I want the person's or persons' head(s).**

- **The Tribunal Hearing is merely the first stage of a RECKONING. Once that is concluded the my path to retribution will be clear.**

- **When I left University I joined the Nigerian Army and by the time I retired I was the first person in my Academy class to be promoted to the rank of Major. I then acted as the a divisional Commander for the Nigerian State Security Service. One of the advantages of having lived the life I have is that I have acquired a very unique skill set, when it comes to fighting others - especially when they decide to not play by the recognised rules. Whether the battle is physical or mental, I have the tools to prevail.**

- **Unfortunately it is not in my nature to allow people to bully or harass me. Fortunately for PURUSHOTHAMAN and ZEEHAN it appears that they both admitted to the management early on (circa 2015) that they never actually saw me sleeping.**

- **Well now your Client is about to realise that pissing me off is not a good idea.**

- **Retirement or Resignation does not does not give those involved in the conspiracy a `pass'. I will take whatever course of action I deem appropriate. As it is said on the Game of Thrones TV series "Winter is coming".**

- **If the new incoming Chairman Sharon WHITE doesn't want to be the shortest serving chairman in the history of the business, it is in the interest of the Business to fully investigate the matters that have arisen and be prepared to present these at the Tribunal Hearing.**

- **Inform your Client not to be fooled by my Intellect, that it is dwarfed by my Savagery - and if provoked that Savagery will take the lead.**

8. Mr Dodds submitted that the Respondent was wholly unused to dealing with correspondence of this nature. The letter, he said, could not be more threatening and its purpose was, he submitted, to threaten, intimidate and

cause concern to the Respondent in the course of defending the Tribunal proceedings. It was conduct plainly carried out in the course of the proceedings and the use of fear in this manner would, he submitted mean that a fair trial was not possible. The danger of putting fear into witnesses is that this would affect the way in which they give evidence. There was, he said, no option short of strike out that would overcome that difficulty.

9. The Claimant maintained that he could not understand why the letter was perceived as threatening. He said that his purpose was to ensure that the Respondent and the witnesses knew that he was going to fight his own corner. He had evidence, he said, that the Respondent's witness evidence was untrue, that he would reveal this during the course of cross examination, thereby ensuring that the Respondent's witness evidence would back his case. It was therefore unclear , he submitted, why he would choose to intimidate the witnesses. When I asked him what his intention had been in writing the paragraph of his letter to the Tribunal that appeared at the top of page 49 of the bundle he said in effect that his words were to be understood metaphorically, not literally.

Conclusions

10. I agree with the Respondent that it is extremely unusual to see language of such a threatening nature in correspondence produced during the course of employment tribunal proceedings. The language used is clearly reprehensible but that is not the only issue with which I need to concern myself.

11. I have considered all three elements of the test set out in *Bolch v Chipman*:

    a. There must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings themselves have been conducted by him or on his behalf unreasonably;
    b. There has to be a conclusion on the part of the Tribunal that as a result of the offending behaviour a fair trial is no longer possible;
    c. Once there has been a conclusion that the proceedings have been conducted in breach of Rule 37(1)(b), and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. Is there an alternative to striking out?

12. I am in no doubt that limb one of the test is met. To write correspondence of the nature of the 18 October 2019 letter to the opponent's representative, albeit in the context of without prejudice correspondence, is self-evidently something done in the course of conducting the proceedings themselves.

13. The more difficult point is whether the sending of the correspondence has vitiated a fair trial. Tribunals are and should be very hesitant to take the draconian step of striking out claims, particularly those involving complaints of discrimination. But even in discrimination cases a line may be crossed. Intimidation of a witness plainly has the potential to interfere with the integrity of the evidence and therefore touches very closely on the question of whether

a fair trial is possible. In this case the question is whether the language used by the Claimant in his letter was likely to have resulted in the witnesses being potentially intimidated, to the extent that the Tribunal cannot rely on their giving evidence fully, freely and openly.

14. In my judgment the Claimant must have known that the letter, although sent to the Respondent's lawyers, would be seen by the Respondent's witnesses in the case. If he did not know he ought to have known and indeed I consider that it was his intention that the letter was seen. It was clear to me also that it was his intention that those reading the letter should feel menaced by it. I considered carefully whether the letter was merely bravado, not to be taken seriously by a sensible and well-adjusted person. But having read it several times, I decided that that was not the case. The letter was in my judgment, genuinely and intentionally intimidating, but more to the point, it is more likely than not to have been perceived as intimidating by any reasonable person reading it.

15. The gist of the Claimant's submission seemed to be "I was only using flowery language and metaphor. I didn't literally mean what I said". I have also considered that submission carefully and even if that that is what the Claimant intended (which as stated in the preceding paragraph I do not believe to be the case) the meaning of his words seems quite clear. It is also clear that the Claimant was threatening some form of action against a number of individuals not just by means of adopting a hostile and aggressive form of cross examination (I considered this as a possible interpretation of the letter) but by means of actions that would continue after the conclusion of the proceedings ("*The Tribunal Hearing is merely the first stage of a RECKONING. Once that is concluded the my path to retribution will be clear*").

16. I am concerned with the probable effect of what the Claimant wrote on the Respondent's witnesses. Statements of the nature of those set out at paragraph 6 above are extremely unusual in employment tribunal proceedings and entirely contrary to the letter and spirit of the overriding objective. Cumulatively the various passages to which I was directed by Mr Hobbs seem to me to have a clearly intimidating effect. I am particularly concerned that the letter has suggested that the Claimant has undertaken research into Ms Mihell's personal background. That seems to me likely to have had a particularly chilling effect on Ms Mihell and her ability to give frank and open evidence to the Tribunal without fear of repercussions, potentially involving '"savagery".

17. The Claimant then seems to me to have doubled down on the intimidating effect of what he said originally with what he wrote to the Tribunal in response to the Respondent's application, when he said:

> **"Management went after an employee who they assumed was a 'mouse', but turned out to be a rabid 'werewolf'. I have made it clear to the Respondent I had to endure the mistreatment from the Respondents Management for many years, and now I want my WAR."**

This struck me as significant because it showed a complete lack of awareness of the effect of his actions on the part of the Claimant and an ongoing attitude of belligerence and hostility, which would only serve to reinforce feelings of fear or anxiety on the part of the Respondent's witnesses. The Claimant had an opportunity to mitigate the effects of his earlier letter, but in fact he did the reverse.

18. Whether or not witness intimidation was on his mind when he wrote either letter, I am concerned with the likely effect of the Claimant having chosen to express himself in this way. In my judgment the Respondent's witnesses are more likely than not to feel threatened and intimidated by the contents of the Claimant's letter to the extent that their ability to give full and frank evidence during the proceedings is at risk and a fair trial of the issues cannot therefore be guaranteed.

19. This conclusion is as Mr Hobbs submitted, closely linked to the question of whether a more proportionate means of dealing with the Claimant's conduct can be found that avoids the draconian step of striking out the claim. I do not however believe that there is any viable alternative in this instance. The effect of threats and menaces cannot be undone and I am unable to identify any step that would undo the problem caused by the Claimant's conduct, in order to make a lesser sanction possible.

20. The Claimant's case is therefore struck out under Rule 37 (1)(b), his conduct of the proceedings having been scandalous and unreasonable such that a fair trial is no longer possible.

Costs

21. The Respondent's application for costs followed my oral decision on the strike-out application. Mr Dodds submitted that the same threshold applies when an application for costs is being considered on the basis of a party's conduct as applies in an application to strike out. Rule 76(1)(a) of the Tribunal Rules provides as follows:

76.—(1) 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, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …..

22. I agreed with Mr Dodds that the threshold had been met on account of the Claimant's conduct in writing the letter of 18 October 2019 and I should therefore consider whether to make an award. Mr Dodds said that he was seeking costs limited to his brief fee for attending the hearing (£1250 plus VAT), a hearing which, he submitted, would have been unnecessary but for the Claimant's conduct.

23. Pursuant to Rule 84 I then made enquiries as to the Claimant's means. The

Claimant told me that his means were limited, that he had an income of approximately £2000 from working two jobs and rent of £1100 per month. Mr Dodds pointed out that the Claimant's letter of 18 October 2019 also contained various statements about the wealth of the Claimant's family in Nigeria which, not unreasonably, he invited me to take into consideration.

24. I took all of these matters into consideration, but concluded that I would not award costs on this occasion. Although Mr Dodds is right, that the hearing would not have had to take place if the Claimant had not acted as he did, it is also the case that as a result of my decision on the strike out application, the Respondent has been spared the costs of the final hearing itself. On balance I decided not to exercise my discretion to award costs, the Claimant, through his own actions, having lost the ability to pursue his claim to a full hearing.

25. The Claimant indicated his intention to appeal my decision to strike out his claim. If he does appeal successfully and the claim is reinstated, the Respondent may renew its application for costs at the appropriate time.

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Employment Judge Morton

Date: 8 October 2020