



EMPLOYMENT TRIBUNALS

Claimant: Ms S Chidzoy

Respondent: British Broadcasting Corporation

HEARD AT: Cambridge ET **ON:** 6th, 7th, 8th, 9th, & 13th
February 2017

BEFORE: Employment Judge Ord

MEMBERS: Mr C Davie
Mr M Reuby

REPRESENTATION

For the Claimant: Mr Jackson (Solicitor)

For the Respondent: Miss Belgrove (Counsel)

PRELIMINARY HEARING STRIKE OUT

1. It is the unanimous decision of the Employment Tribunal that the Claimant's claim is struck out, pursuant to rule 37 1(b) and (e) of the Employment Tribunal Rules of Procedure 2013.

REASONS

Background To The Application To Strike Out

1. This application was made by the Respondent part way through the Full Merits Hearing of this case.
2. The case was listed for an eleven day Hearing commencing Monday 6th February 2017 at the Employment Tribunal sitting in Cambridge.

3. The case proceeded normally at first. On Monday 6th February, the Tribunal engaged in preliminary reading and the parties were charged with agreeing a clearer list of issues for determination. On Tuesday 7th and Wednesday 8th February, the Claimant was cross examined by counsel for the Respondent after being sworn to the truth of her witness statement. During Wednesday 8th February two of the Claimant's witnesses were interposed during her evidence (Ms Corlett and Mr Cahalan) due to their limited availability.
4. On Thursday 9th February the Claimant's cross examination continued. Shortly before noon the Tribunal took a short break at an appropriate juncture in the cross examination by way of a comfort break. Prior to the short adjournment the Claimant was warned, as she had been before each adjournment (whether long or short) during the course of her evidence that as she remained under oath and was part way through her evidence she was not to discuss her evidence or any aspect of the case with any person during the adjournment. She was specifically advised on 9th February, given the stage the case had reached, that she was receiving that warning for what would probably be the last time as the Respondent's counsel was approaching the end of cross examination.
5. On the resumption of the case at 12.20pm on 9th February Miss Belgrove advised that there was a serious matter which the Respondent was obliged to raise, namely that during the adjournment, the Claimant had been seen in discussion with a third party (subsequently identified as a journalist working for the Eastern Daily Press) which discussion had been terminated by Miss Belgrove. Both she and her instructing solicitor, as well as one of the Respondent's witnesses, had seen the individuals in discussion.
6. We determined that the Claimant should be given an opportunity to speak to her representative about this matter and this matter alone, and a further adjournment took place of 30 until 12.55.
7. On resumption of the Hearing, Mr Jackson on behalf of the Claimant stated that the Claimant had not been discussing her evidence. He told us at the time (as per the Judge's note crossed checked with the Members' notes and the record provided by Miss Belgrove's instructing solicitor) that:
 - 1) Mr Jackson had offered to speak to the relevant journalist.
 - 2) That they went together towards a room where the Claimant was sitting on her own and therefore did not enter that room but spoke outside the room (or in another room).
 - 3) Mr Jackson then went into the room where the Claimant was to retrieve copies of some witness statements,
 - 4) Subsequently Mr Jackson and the Claimant and the journalist were all together in the open waiting area,
 - 5) Mr Jackson then left to go to the lavatory leaving the Claimant and the Journalist together.
8. Mr Jackson said that he had not heard anything said that was "untoward".

9. Miss Belgrove advised us that she had been alerted to the discussion taking place by her instructing solicitor and was then en route to stop the discussion when she met Mr Silk (one of the Respondent's witnesses) who advised her of what he had heard. She approached the Claimant and the Journalist who were alone and stopped the conversation.
10. In the light of the need to have the full version of events from both sides, to enable the Respondent's counsel to take instructions on whether, and if so in what terms, she wished to make any application following this incident, the Hearing was adjourned until Monday 13th February at 12 Noon (the Tribunal was not in any event sitting on Friday 10th February).
11. Directions were given for the Respondent to set out its application in writing by 2pm Friday 10th February along with any authorities and for exchange of skeleton arguments and any supporting documents to be made by 10am on Monday 13th February.
12. During the course of the Hearing of today's application, Mr Jackson on behalf of the Claimant advised that he had not received the authorities in accordance with the direction set out above but had in fact received them that morning. Whilst he raised this point and was given an opportunity to ask for additional time to enable those authorities to be considered, he did not seek any such adjournment. The matter was not raised at the beginning of the Hearing but part way through it and the Hearing proceeded.

The Application to Strike Out

13. The Respondent made, against that background, an application under rules 37(1) (b) and (e) of the Tribunal Rules of 1993 to strike out the Claimant's case on the basis that the manner in which the proceedings had been conducted by or on behalf of the Claimant had been scandalous or unreasonable and that it was no longer possible to have a fair trial.
14. The Respondent has provided written submissions and records of events from counsel, her instructing solicitor and Mr Silk (as well as another witness, Ms O'Donnell, but she merely saw the Claimant's representative speaking to the member of the press which of itself gives no grounds for concern).
15. Miss Belgrove has also referred us to extracts from Harvey on Employment Law and Plc law, both on the issue of striking out. She has brought our attention to two authorities namely *Sud v London Borough of Hounslow* UK EAT/0156/14 and *Jackson v Cambridgeshire County Council* UK EAT/402/09 (although the latter of those relates effectively to a previous incident also involving Mr Jackson which we do not find advances either parties' position in relation to this application).
16. The Claimant has provided written submissions and statements from Mr Jackson and the Claimant, copies of emails between the Claimant and Mr Weismann at the Respondent, relating to a pre-hearing request made to

the Claimant for information regarding her case, and a hand written note from the Journalist involved on 9th February. We have further been shown an exchange of emails on 11th/12th February and an exchange of text messages to and from the Claimant. We are told that those text messages are between the Claimant and a member of the Respondent's London News Desk who was seeking information as to the scheduling of witnesses in the Hearing and when Ms O'Donnell would be giving evidence. The Claimant, quite properly, told the enquiring journalist that she could not give him or her any information. This led to an exchange of emails between the parties' legal representatives regarding the allocation (or not) of a press officer to the Claimant in relation to the substantive case before us, none of which, it appears to us answers the question of the Respondent's application in any way.

17. The Respondent' application is essentially a simple one. It is said that notwithstanding the clear warnings given by the Tribunal to the Claimant at each adjournment in the proceedings (made in the hearing of all persons present in the Tribunal room including any journalists and the Claimant's own legal representatives) that she should not engage in discussion with anyone regarding the case or her evidence in it until her evidence was completed. She engaged in discussion with a journalist during an adjournment about matters relating to the case and her evidence. The Respondent says that this is compounded by the fact that there had been a discussion between the journalist and the Claimant's representative in the Claimant's presence immediately prior whereafter Mr Jackson absented himself, leaving the Claimant and the journalist alone.
18. According to the Respondent's submissions and the reports of events provided by her instructing solicitor and witnesses, it was her instructing solicitor, Ms Janjua who first reported to Miss Belgrove that she had seen the Claimant with another person in discussion and specifically heard the Claimant use the word "Rottweiler". She immediately reported this to Miss Belgrove.
19. Ms O'Donnell said that she saw Mr Jackson offering to "brief" the journalist but it is not clear when in the sequence of events this is said to have occurred.
20. Acting on what Ms Janjua told her (and not on anything which Ms O'Donnell had reported), Ms Belgrove went into the area where she had been told the Claimant was in discussion. En route she met Mr Silk who reported that the Claimant was in discussion with a third party and that he had heard discussion about "dangerous dogs". Miss Belgrove then approached the Claimant and the journalist, herself heard use of the word "Rottweiler" (but could not say who said it) and intervened in the discussion. As it broke up either the Claimant or the Journalist (Miss Belgrove could not say which) was heard by her to say "sorry, I have known her for ages".
21. According to Mr Jackson's statement produced today the events were these. He, the Claimant and the Journalist briefly stood as a group of three in the lobby area in discussion. Mr Jackson then went to the

bathroom saying he would return and provide the information the Journalist needed. On return, he said, the Claimant had gone. He invited the Journalist into a room and she said she could not go in because the Claimant was there and so Mr Jackson and the Journalist went to an adjacent room to discuss the case and he provide for her sight of some witness statements.

22. The Claimant's report of events was that she was approached by the Journalist as she was leaving the Tribunal room for the adjournment and that they may have shaken hands. Everyone left the Tribunal room and the Claimant says that she walked over to the reception desk where she stood waiting for Mr Jackson because he would normally take her into the room where she would sit during an adjournment but he said that he would be "back in a minute" and so the Claimant decided to wait for him. She said that she engaged pleasantries with the Journalist about her working for Eastern Daily Press and staff shortages. The Claimant then says that the Journalist proffered the information that she had once been called a "Rottweiler or Terrier" in relation to her work and the Claimant said it was at this point that Miss Belgrove intervened.
23. A written version of events was provided from Ms Gliss, the Journalist in question. She said that the Claimant had approached her and said hello and shook her hand. She said that the Claimant and she were chatting and that she herself volunteered that she had been called a "Rottweiler" in the past at which point the conversation was stopped by Miss Belgrove.
24. The use of the word "Rottweiler" is relevant because the most recent part of the Claimant's cross examination before the adjournment related to an email circulated within the BBC (but not to her) in relation to the possible coverage of a story regarding the Dangerous Dogs Act where it was suggested that the Claimant could be the relevant reporter but referred to her as "Sally Shitsu". The Claimant had objected to this terminology which she said was demeaning on the grounds of her gender (by calling her, in terms, a dog) and abusive generally by implication that she was a "shit journalist". The Respondent's position was, inter alia, that the Claimant herself had said that she would not have objected if she had been called "Sally Terrier" or "Sally Rottweiler". The Claimant denied this and said that any reference to Rottweiler and Terrier during the course of the grievance hearing when this exchange was said to have taken place related to the occasional use of those words in a complementary way about journalists who would not give up on a story. The words themselves were in debate during cross examination of the Claimant by Miss Belgrove.

The Relevant Law

25. Under rule 37 of the Employment Rules of Procedure 1993
 - (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 had been conducted by or on behalf of the Claimant or the Respondent (as the case may be) as being 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 or response (or the part to be struck out).
26. In *Sud v London Borough of Hounslow*, a case concerning the alteration of the date on a medical document and a lie told by the Claimant as regards her medical condition, the Employment Appeal Tribunal did not allow an appeal against a striking out order made by the Employment Tribunal. The Tribunal Judge had identified unreasonable conduct and willing disobedience of a Tribunal order, neither of which were determinative, but also had decided that the Claimant's actions fundamentally undermined the trust which the Tribunal could have that she was acting truthfully and in good faith.
27. The Tribunal has reminded itself of the terms of cases referred to in that decision including *Blockbuster Entertainment Ltd v Jones* [2006] IRLR 630, and the need to consider the proportionality of striking out with the obligation to ensure as far as possible that triable cases are tried, along with *Bulch v Chapman* UK EAT/1149/02 and *DeKeyser v Wilson* [2001] IRLR 324 and the vital importance placed upon the question of whether a fair trial is possible.

Conclusions

28. There is some divergence of evidence between the information given to the Tribunal by Mr Jackson in the immediate aftermath of the events of 9th February as we have recorded them above and the version of events now reported by him, the Claimant and Miss Gliss.
29. In particular, it is not clear whether the Journalist and Mr Jackson spoke separately before the discussion with the Claimant in the lobby or not.
30. What is clear however, is this. Firm, clear and unequivocal instructions were given to the Claimant at each adjournment not to discuss her evidence or any aspect of the case with anyone during the adjournments.
31. This was repeated clearly before the adjournment in question and at no stage on this occasion or earlier occasions (this was the sixth adjournment including those taking place at the end of days or for lunch breaks and on each occasion the Claimant was given the appropriate warning) did the Claimant or anyone on her behalf raise any question or suggest there was any lack of understanding about the direction being given.
32. The Claimant was not unrepresented. There were two members of the solicitors' practice acting on her behalf present throughout the Hearing and during the adjournments. They fully understood (or should have done) the

importance of a witness not engaging in discussion whilst they are giving evidence. It is said by Miss Belgrove that this is ever more so when it is one of the parties to the action that is giving evidence but that seems to us an unnecessary gloss on the events (save in except that a witness giving tangential evidence might simply might have their evidence disregarded in such circumstances if it was appropriate).

33. The discussion between the Claimant and the Journalist was either facilitated by Mr Jackson (he did not ensure the Claimant returned to her room but engaged, on his own report, in a three way discussion with the Claimant and the Journalist) or permitted by passive conduct. He was engaged in a three way discussion with the Journalist and the Claimant, absented himself to go to the lavatory but did not ensure that the Claimant also terminated the conversation and went to her room.
34. We unanimously take the view that it stretches the bounds of credulity to believe that in those circumstances (in particular where the third party was a Journalist who was asking for information about the case and who on Mr Jackson's own evidence was going to be given information when he returned) would not have asked questions about the Hearing. Miss Belgrove, Ms Janjua and the Journalist all confirm the use of the word "Rottweiler" and Mr Silk referred to the Claimant speaking about "dangerous dogs". Even if, as is stated by the Claimant and the Journalist it was the latter who initiated the use of the word "Rottweiler", that clearly points to discussion as regards the questions put in cross examination to the Claimant that very morning. There is no mention of that word in the Claimant's own evidence as set out in her witness statement.
35. We therefore unanimously find as a fact that the Claimant was engaged in discussion about the case and her evidence with Ms Gliss. It is beyond our understanding as to why the Claimant was left by Mr Jackson alone with the Journalist during an adjournment and equally why she was allowed to be part of a three party discussion with the Journalist and Mr Jackson at what was a very late stage of her evidence with the strictures of the Tribunal given, as we have said, no less than six times ringing in their ears.
36. That discussion during the currency of the Claimant's evidence in our view constitutes unreasonable conduct. It shows a disregard for the Tribunal's clear instructions as a result of which the Respondent has made the application which is before us.
37. We then turn to the question of whether a fair trial is still possible.
38. Miss Belgrove presses the point that if the Claimant was engaged in this conduct on one occasion it cannot be said that she has not done so on other occasions. It is correct that this case, by virtue of the identity of the parties, has attracted significant interest in the media and that a number of journalists have come and gone from the Tribunal Hearing room during the course of the Hearing.

39. We are bound to consider that point but do not place any significant emphasis on it because there is equally nothing to suggest that a discussion of this type has occurred on other occasions. We are concerned, however, that in the immediate aftermath of the incident on 9th February, Mr Jackson first told us that he had heard no inappropriate discussion (but then confirmed that he had left the Claimant and the Journalist alone and could not hear what they were saying) and further that his record in particular of the sequence of events of the day has altered substantially from his immediate contemporaneous recall to the events as they are now described in writing.
40. The fact of the discussion and its contents, compounded by the way it was allowed to take place, the clear finding that the Claimant and the Journalist were engaged in a discussion about the case and the Claimant's evidence part way through her cross examination by specific reference to matters raised in cross examination that morning have led us to conclude, however, that the trust which the Tribunal should have in the Claimant has been irreparably damaged. That is reinforced by the doubtful veracity of the report of events which we have had from the Claimant's representative which has altered significantly between Thursday and today (Monday).
41. Miss Belgrove draws to our attention the fact that after the incident had taken place, it was not the Claimant or her representative which sought to bring the matter to the attention of the Tribunal and explain it but rather it was left to the Respondent to raise it. The Claimant's representative should have realised that allowing the Claimant to speak to a Journalist alone at the relevant time was at least foolhardy and some explanation, once the Respondent was aware of the discussion and had intervened in it, was clearly due.
42. All of this has led us to the conclusion that we as a Tribunal do not have the necessary trust in the Claimant who should have well understood that a discussion about her evidence and any aspect of the case, during an adjournment whilst she was still under oath and undergoing cross examination should not have taken place. We have considered carefully whether this is a matter which we can, in terms, overlook but we cannot. Unanimously we consider that a fair trial is no longer possible. The flagrant disregard of clear and repeated instructions from the Tribunal not to discuss the case for her evidence given to the Claimant on a number of occasions has been disregarded. Information passed between a third party and a witness during that person's evidence runs the substantial risk of corrupting the evidence of the person concerned and that is why clear warnings are given. Here there was clear discussion about a matter which had been raised during cross examination that very morning.
43. In the circumstances we do not consider that a fair trial before us is possible.
44. We have considered two further matters.
45. First we have deliberated as to whether a fresh Hearing before a different Tribunal would be a proportionate response to the situation. We have

concluded that it would not. The Claimant's evidence was almost completed. To begin again could (and we unanimously consider invariably would) lead to disputes over alleged changed in evidence from this abandoned Hearing, placing the second Tribunal in an invidious position. Further the second Tribunal would be aware of the reasons for the abandonment of this Hearing and they too would be faced with the doubts as to the Trust that could be place in the way the case was being presented by or on behalf of the Claimant as we now face such that a fair trial would not in our view be possible before a different Tribunal.

- 46. We have also considered whether it would be proportionate only that part of the Claimant's claims (those that relate to the "Shitsu" email) and her grievance would be appropriate. However, it is the fatal damage to our trust in the Claimant and the way the case is conducted on her behalf that has led us to the unanimous conclusion that it was not possible for a fair trial of any of the issues in this case to take place.
- 47. Accordingly the Claimant has been guilty of unreasonable conduct and this Tribunal considers that it is no longer possible to have a fair Hearing in respect of her claim.
- 48. For those reasons the Claimant's claim is struck out.

Employment Judge Ord, Cambridge

ORDER SENT TO THE PARTIES ON

23 February 2017.....

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FOR THE SECRETARY TO THE TRIBUNALS

FAILURE TO COMPLY

NOTES: (1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.