EMPLOYMENT TRIBUNALS

Claimants		Respondents
1. Mr R Peters	v	1. Wernick Group Holdings Ltd
2. Ms M Varela		2. David Wernick

PRELIMINARY HEARING

Heard at: Watford **On:** 26 February 2018

Before: Employment Judge R Lewis

Appearances:

For the Claimants: In person
For the Respondents: Mr M McLaughlin, Solicitor

RESERVED JUDGMENT

All claims of both claimants are struck out.

REASONS

This hearing

1. This was the hearing of an application on behalf of the respondents for the claimants' claims to be struck out under rule 37 of the Rules of Procedure, on the grounds of unreasonable or abusive conduct of the proceedings. The respondents' solicitors had made the application in correspondence more than once.

2. I proceeded relatively informally at this hearing, opening by reminding the parties that this was to be a public hearing in full, and that it was open to me to reach separate decisions in relation to each claimant. I also reminded the parties that recording of proceedings is forbidden. Ms Varela said at the start that Mr Peters was not representing her. The tribunal file showed that he had done so since April, without any indication before Ms Varela spoke that he was not fully authorised to do so.

3. I adjourned to read the bundle, submissions, and authorities prepared by the respondents. Mr McLaughlin then addressed the tribunal in support of his submissions. In the course of his address, it became apparent that there was no evidence before the tribunal to show how Ms Daniel had reacted to the claimants' letter to her. Mr Wernick was called, and gave brief evidence on that one point.

4. At the end of the submissions, I adjourned to enable Mr Peters to finalise his reply. At the end of Mr Peters' reply, Ms Varela replied further briefly in Portuguese, through the interpreter.

5. Although it had been my aim to give judgment, in the event I reserved judgment but took the opportunity to re-list the hearing for January 2019. That listing is now cancelled.

6. While drafting this judgment, it occurred to me to append the claimant's letter to Ms Daniel to the Reasons. I caused a short email to be sent to the parties, asking to be sent a copy by email. The tribunal file shows that this simple request produced correspondence from Mr Peters which was unnecessary and voluminous. Mr McLaughlin sent in a copy of the email, as requested, and replied to Mr Peters' correspondence in part. Other than the appendix below, I have disregarded in its entirety all material sent to the tribunal after the end of this hearing.

The background setting

7. I set out my understanding of the background setting. The following represents my understanding and sets the scene for this hearing. I make no formal findings of fact.

8. The claimants are a couple who have been together for over 30 years. They were born in respectively 1957 and 1959. The first respondent is an industrial company employing some 700 employees. The second respondent is a member of the family which owns the first, and is its Chairman and a substantial shareholder.

9. In 2013 the first respondent employed both claimants to work in a housekeeping and maintenance capacity at the second respondent's private home. Accommodation was provided for them. The employment relationships ended in about September 2016.

10. Day A was 1 December 2016 and Day B 1 January 2017 in the case of Mr Peters and 4 December 2016 and 4 January 2017 in the case of Ms Varela. Their claims were presented respectively on 1 and 3 February 2017.

11. Solicitors who were on the record for the claimants when the claims were presented withdrew in April 2017. Since then Mr Peters has represented both claimants, and signed correspondence in both their names. Where below I refer to 'the claimant' in the singular I refer to Mr Peters.

12. There have been preliminary hearings before Employment Judge Hyams on 16 June and 2 November 2017. The present date was listed in June as the first day of a four-day full merits hearing. It was converted to a one day open preliminary hearing shortly before this hearing.

13. As appears from the claim forms and responses, the termination of these employments was accompanied by strong feeling on both sides. In the litigation, allegations raised on both sides have appeared highly personalised, and have included allegations about previous employment of the claimant, and previous employees of the first respondent. I mention these last matters (which appear, at best, peripheral) to indicate the level of acrimony on both sides.

14. Mr McLaughlin on behalf of the respondents based his application to strike out on three broad points, which I now discuss separately.

Abusive language

15. The first was that in correspondence with Mr McLaughlin's firm and about the case, Mr Peters has repeatedly used rude and abusive language. I do not mean foul language, but personalised attacks. I was shown letters and emails, all undeniably written by Mr Peters, and I noted the following instances: "David [Wernick] uses people to his delight in his interests"; repeatedly in correspondence he referred to the second respondent as "Wernick" not Mr Wernick. He accused Mr McLaughlin of being 'tricky'. He wrote to Mr McLaughlin, "Did I of offend you? What kind of lawyer are you anyway?..... You are desperate and I can see that, but there is much more to come I can promise you." He accused Mr McLaughlin and his firm on a number of occasions of trying to deceive the court with false information.

16. I deal with all of those matters relatively briefly. I am confident that no linguistic issue arises. I am confident that Mr Peters' English skills are more than adequate for him to understand when he is being rude or abusive. I accept that taken together, his remarks constitute abusive and unreasonable conduct of the litigation.

17. If they were the only source of complaint, I would not consider it right to strike out the proceedings. The claimant has exercised his absolute rights to act in person and to represent Ms Varela; the tribunal must have regard to a requirement to place the parties on equal footing; I must bear in mind that the claimant has no legal education; and he is writing in his second language (or possibly third). While I do not defend or justify the language, I record that Mr McLaughlin agreed with me that a solicitor conducting litigation needs both broad shoulders and a thick skin. (I add the same observation about an industrial employer of 700 employees). I agree with Mr McLaughlin that Mr Peters' language has been deplorable. It would not be proportionate to strike out for that matter in isolation. I do however attach weight to it as one factor which leads me to the view that the claimant does not respect the discipline of the tribunal system, which is a factor in my decision to strike out.

Ms Minto

18. The second matter on which Mr McLaughlin relied was the case of Ms Minto. The claimant had uncovered a report from the Daily Mail online of June 2011 to the effect that the first respondent had been found by a tribunal to have discriminated on the grounds of sex against a Ms Minto, in whose favour a financial award was made. I was told that Mr Wernick gave evidence at the hearing. The Daily Mail report had one reference to him: "[Ms Minto] wrote to David Wernick, Chief Executive of the company, to say she had had enough after she felt little had been done to address Mr Swatton's behaviour."

19. The claimants accepted that at the preliminary hearing in June, Judge Hyams said that Ms Minto's case was not material to their case. Mr McLaughlin submitted that the claimant had, despite that observation (not recorded in the Judge's Order of that day) repeatedly referred to Ms Minto in material which he had written, including the email to Ms Daniel. When asked, the claimant said that he understood that Judge Hyams had expressed what he (Mr Peters) called "an opinion" that the Minto case was irrelevant, but he did not seem to regard himself as precluded from reference to Ms Minto.

20. Mr McLaughlin submitted that further reference to Ms Minto was unreasonable behaviour. I reluctantly disagree. If the Judge had made an Order excluding reference to Ms Minto, that would be different. There are many instances of claimants in person who pursue irrelevant or marginal points, sometimes in the teeth of judicial instruction not to. The claimant has responded poorly to guidance. But in the absence of a judicial Order, I decline to find that his behaviour on this point meets the threshold of unreasonableness. It nevertheless mirrors the issues set out above and below in showing disregard for the discipline of the tribunal.

Ms Daniel

21. The third and determinative matter referred to a lady called Ms Maria Daniel. She is a Portuguese lady, who has lived in England since the 1980s at least, and has known Mrs Wernick and the second respondent for about 30 years. She has carried out tailoring work for them across that period.

22. It will be recalled that this day was the listing of the first day of the full hearing. I was told that witness statements were exchanged on 26 January. Today's bundle contained a copy of Ms Daniel's short witness statement dated 26 January 2018. She gave her statement on behalf of the respondents, which I was told was served on that day in undated form.

23. While the statement should be read in full, the material matters are the following. The claimants allege that Mr Wernick expressed racist views about Portugal and / or Portuguese people. Mr Wernick vigorously denied the allegation, and stated in turn that Mr Peters had spoken to him in offensive, anti-Semitic terms. Racial discrimination and prejudice are group wrongs, and evidence of an individual relationship with a member or members of the group in question may be relevant.

Ms Daniel gave evidence of a friendship with Mr and Mrs Wernick which lasted over decades. It seemed to me potentially relevant that the tribunal should hear from a witness of Portuguese origin who could testify to a long, warm friendship with the second respondent and Mrs Wernick.

24. In the second part of her statement, Ms Daniel described a friendship which she formed with the claimants after they came to work for the respondents. Her evidence was that Mrs Wernick, realising that Ms Varela's English was limited, introduced her to Ms Daniel so that she would meet another Portuguese person. That was an act of thoughtfulness, consistent with friendship and open mindedness. It showed some sensitivity to the experience of a woman in a foreign country and without language skills. That seemed to me evidence which the tribunal should have the opportunity to consider.

25. Ms Daniel went on to give an account of her friendship with Ms Varela, and of the confidences exchanged between them. As the confidences related to, among others, personal relationships, I do not set out any more information about them here.

26. In the final part of her statement, Ms Daniel spoke about the events at and around the time of the termination of the claimants' employment. In particular, her evidence was that even after Mr Peters had been dismissed, Mrs Wernick had offered Ms Varela accommodation, employment, and an introduction to an employment agency, all with a view to assisting her after termination of her employment with the first respondent. That seemed to me plainly of the greatest relevance to Ms Varela's claim of unfair dismissal. It could also be relevant to any allegation of racial discrimination against Mr and Mrs Wernick.

27. A week after service of the statement, the claimant sent an email to Ms Daniel in Portuguese, the agreed certificated English translation of which forms an appendix to this judgment. It can be seen that it is abusive of Ms Daniel and her evidence, and abusive of the Wernicks. To further the abuse, it attached a link to the Mail article about Ms Minto. It contained, and concluded with, a plain threat: withdraw the witness statement, or face the unpleasant, expensive consequences of legal action by Mr Peters, and possibly Ms Varela.

28. I was shown text messages sent on 3 February by Ms Daniel to Mrs Wernick when she received the email. Mr and Mrs Wernick obtained a google translate version of it. Mr Wernick gave evidence of going to Ms Daniel's home to talk about the email. He said that he found Ms Daniel in a state of distress, as the threat of legal action left her, a single lady of limited means, feeling vulnerable. She said that she regretted her involvement in these proceedings, and did not wish to be involved further.

29. Mr Wernick said that he subsequently telephoned Ms Daniel to check his understanding, and that Ms Daniel reiterated her position, and stated that her sons had told her not to become involved. She said that she had booked to travel to Portugal at the time scheduled for this hearing. Mr McLaughlin submitted that the witness order powers of the tribunal would not assist in such a case, even if

(as appeared unlikely in the circumstances) the respondents wished to ask for their use.

The claimants' replies

30. In submissions, the claimants both spoke about the substance of the case, and seemed not to understand the point of this hearing. Mr Peters admitted that it was his 'biggest mistake' to have sent the email and that he should not have contacted Ms Daniel. He said that he gave his word of honour to take no action against Ms Daniel if she participated in the proceedings, and not to contact her. He then went on to say that he had been very angry at the time because she had betrayed her friendship with the claimants (I understood that this referred to the more intimate portions of her witness statement). Mr Peters also spoke about what he called Latin culture and his emotions when he read her statement.

31. I asked Mr Peters to comment on a point which troubled me. Although he agreed that he had been told by Judge Hyams that the Minto matter was not part of this case, he referred to its relevance to what he described as "the character of Mr David." Although Judge Hyams had plainly found in November that there was not a binding settlement agreement between the parties, the claimant did not seem to understand or accept this, and told me that after conclusion of these proceedings, he would and could bring proceedings in the County Court for breach of contract.

32. I was troubled that these matters appeared to show again a lack of respect for the authority of the tribunal, and the discipline of its process. The claimant replied by stating that he was confused, was in a foreign country, and was not a lawyer. I doubt that the courts of Portugal permit abusive language or witness intimidation, and I was confident that the claimant's conduct was not in any way related to education, language, culture or origins. All that in turn led me to reflect on whether any assurance about future conduct given by the claimant in response to my comments or observations might hold weight.

Discussion

33. The application was brought under rule 37, which so far as material 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 the claim or response on any of the following grounds - …… 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…… 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)."

34. I approach the application at three stages. First, I must find as fact what has happened. Secondly, I must decide whether what has happened constitutes unreasonable conduct of the proceedings. Finally, I must consider whether it is in the interests of justice to strike out the proceedings. In doing so, I must pay

proper regard to the proportionality of the sanction of depriving a claimant of the right of a hearing, and whether I consider that a fair trial remains possible. In accordance with the over riding objective, it is necessary to consider the balance of fairness between a claimant in person and professionally represented respondents.

35. In considering an application, the tribunal must pay due regard to the overriding objective. Mr McLaughlin referred me to a number of authorities, notably Arrow Nominees v Blackledge 2001 BCC591; Bennett v Southwark LBC 2002 EWCA Civ 223 and De Keyser Ltd v Wilson EAT/1438/00. I also had regard to Blockbuster v James 2006 EWCA Civ 684.

36. At the first stage, I ask whether the test of rule 37 has been met. I find first that rule 37(1)(b) has been met, and that by writing the email in question to Ms Daniel, Mr Peters has conducted the claim unreasonably. I bear in mind that there are two separate findings to be made. One is the fact find of what happened. That relates solely to the undisputed action of the claimant in writing to Ms Daniel. The second is whether that act meets or met the rule 37 definition, and I find that it did. If it is necessary to amplify that finding, it is that the letter was sent gratuitously, not in hasty reaction, shortly before trial, in an undisguised attempt to coerce a witness into retracting her evidence at trial.

37. I go on to the considerations which lead me to the conclusion that strike out was proportionate and in the interests of justice.

38. In favour of the claimant, I make all allowances for his ignorance and inexperience of the legal process. In this respect I can make no allowance for his use of English, because the offending email was sent in Portuguese. I accept also that these events have been emotive for everyone involved.

39. The factors which in the balance lead me to strike out were the following, not in order of priority or exhaustively: -

    39.1 The email was sent to a witness who was about to give evidence at a public hearing in hostile, acrimonious litigation. Her evidence was on its face relevant, and was damaging to the claimants' cases. The email constituted a demand to the witness to retract her evidence. It was a plain attempt to interfere with witness evidence and thereby affect the course of the proceedings;

    39.2 The email expressed a peremptory demand, coupled with a threat of retaliation; it does not matter, for these purposes, whether the threat was viable in law.

    39.3 The threat was made, as Mr Peters knew, to a witness who was single, not young, not with means of access to lawyers, and who was, in a word, vulnerable to pressures;

    39.4 In her witness statement, Ms Daniel had included the following [at a time when the claimant and Ms Varela were living apart] "She didn't want to

stay at my house because she was afraid [the claimant] would come round and smash my windows." When he wrote to her, the claimant knew that Ms Daniel had expressed a fear of physical violence on his part.

39.5 The email was not a heat of the moment reaction to reading Ms Daniel's witness statement. I attach weight to the fact that it was sent to Ms Daniel a week after the service of the witness statements. It must therefore have been the product of some reflection and preparation;

39.6 It went far beyond an expression of disagreement with the contents, or of surprise that Ms Daniel had, as the claimant saw it, allied herself against his interests;

39.7 While I appreciate Mr McLaughlin's irritation that the email referred to the Minto case, and linked Ms Daniel to it, that seems to significant only to the extent that it showed disregard for the guidance of the tribunal on the point.

39.8 The common thread which I found linked the email with the claimant's abusive language, and the reiterations of the Minto case, was the claimant's persistent disregard of the discipline of conducting a tribunal case.

40. The claimant told me that he would not contact Ms Daniel again, and would not seek to interfere with her attendance as a witness. I do not accept those assurances. I remain concerned that the claimant cannot be relied upon to engage with the discipline of the tribunal in the manner required by the tribunal, and in accordance with the overriding objective. I was concerned that his remarks to me were the product of expediency.

41. I have considered whether Ms Daniel's evidence appears truly material. It could be said that if a wholly irrelevant witness had been threatened, a fair trial could nevertheless take place and strike out would be disproportionate. One immediate difficulty with that approach is that the relevance of the evidence of a particular witness is to be assessed in the overall context of the evidence in the proceedings. However, it is easy to see that Ms Daniel's evidence is potentially relevant for the reasons identified above.

42. I accept that Mr Wernick gave honest evidence in describing Ms Daniel's distress, and in reporting to me what she had said.

43. The existence of the witness order procedure does not seem to me to meet the point. The procedure must be triggered by application of the respondents, who are at liberty, in the circumstances, to decline to do so. (I add, for avoidance of doubt, that it is wholly inconceivable that the tribunal would allow any application by the claimants for an order to compel the attendance of a reluctant, opposing witness whom they had threatened). The witness order procedure may secure the attendance of the witness at the tribunal, but is not guaranteed to do so. The mechanism for its enforcement is toothless, and known to be so. Even if the procedure secures the attendance of the witness, it cannot guarantee that she

feels safe to give the evidence which she considers to be the truth in accordance with her oath. The tribunal can offer a witness no assurances about safety outside its own premises or after the hearing.

44. It does not seem to me fair to require the respondents to prepare for a hearing in eleven months' time without knowing if a material witness will attend. It is not fair to place Ms Daniel in fear for that period.

45. I must give due weight to the reality that strike out is the ultimate sanction for the tribunal, because it deprives a party of access to a hearing. I must in that context consider whether the sanction is proportionate to the wrong doing, bearing in mind Lord Justice Sedley's observation in Blockbuster to the effect that the doors of the tribunal are open to the difficult as they are to the compliant. It is in the context of proportionality that I consider the issue of whether the conduct complained of has an impact on whether a fair trial is possible. (I do not consider that question as a free standing point under 37(1)(e)).

46. I find that a fair trial is not possible in circumstances where a material witness has formed a reasonable view that as a result of intimidation she wishes to withdraw from giving relevant evidence.

47. Mr Peters signed the email in question, as he signed almost every item of correspondence which I saw, in his name and that of Ms Varela. Until Ms Varela said that she wished to address the tribunal separately through the interpreter, I had no indication that he might not be her authorised representative. On the contrary, he had represented her for 10 months. In my judgment, my order applies equally to both claimants. Rule 37 empowers the tribunal to strike out a claim on the basis of the representative's unreasonable conduct, and I do so. In addition, I note that Ms Varela's only claim was one of unfair dismissal, and that that is part of the claim to which Ms Daniel's evidence goes most directly. Ms Varela's claim is struck out because of her representative's unreasonable conduct.

Appendix

PARAGRAPH TRANSLATION – PORTUGUESE TO ENGLISH

"Maria Daniel

We know of the shameful, untruthful and offensive document that you signed to favour the Wernicks. You do not know me at all and took advantage of my wife's kindness to get involved in matters that don't concern you, to favour people who at the end of the day, you don't know and ultimately you showed your real nature. You've shown no shame in siding with the lying Englishmen against people from your own country who (almost) can get anything with money. I'm not going to waste much more time with you so I'll only give you one last chance to retract and to withdraw your statement which is manifestly offensive, defamatory, vexatious and which would justify our taking the appropriate response of filing proceedings against you for

defamation. But we want to give you one last chance to redeem yourself, look at and follow this link and see what your friend David Wernick did to this woman just a short while ago (2009) This woman, Catherine Minto was subjected to sexual harassment at his company by a colleague. Instead of defending her (wernick) did everything to ensure she resigned (I have in my possession the whole file on the English tribunal proceedings). He lost the tribunal proceedings and had to pay compensation of £21,000 to the said Ms Minto. It also affected her health and she was at the time left so short of money that she had to resort to a bank loan to survive. The case ended up falling into the public domain and so was reported in the press and I was then able to find out about it. But that's not the end of it this was not the only time that your great friend Wernick had appeared before the tribunal unfortunately there are other cases involving a man whose profile and character are sinister. http://www.dailymail.co.uk/news/article-2009400/Sexist-boss-acted-like-Carry-On-actor-Sid-James-bombarded-female-manager-lewd-comments.html

Is this the sort of person you want to help? At your age you could be expected to have better judgment and not to get involved in things of which you have no understanding or knowledge. Has knowing Lucy as a client for 30 years given you some form of knowledge of her personal life? Don't make me laugh Lucy doesn't give out her card to people who she considers to be inferior, and so therefore your knowledge of the Wernicks is merely skin deep. You have from today 8 days, starting on 05.02.2018, to retract the assertions you made in your statement in favour of wernick. If this results in something that could affect your personal life such as a compensation payment, don't then complain about it.

Rui peters and Maria Varela”

Employment Judge R Lewis

Sent to the parties on:

14 March 2018

For the Tribunal:

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