EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Miss S Ellis	Cranswick Foods plc

Heard at: **Leeds** **On: 10-14, 17-20 June and 16 and 23 July (deliberations) 2024**

Before: **Employment Judge Davies**
Mr J Howarth
Mr Q Shah

Appearances
For the Claimant: **In person with Mr Massingham**
For the Respondent: **Mr Hemsi (solicitor)**

JUDGMENT ON STRIKE OUT APPLICATION

1. The Respondent's application to strike out the claim is dismissed.

REASONS

Introduction and factual background

1. This application to strike-out the claim was made at the start of the Respondent's closing submissions following a nine-day hearing of the Claimant's claims of unfair dismissal, sex and disability discrimination and victimisation. Those claims, including the Tribunal's findings of fact based on the evidence given by the witnesses and its conclusions about the Claimant's disabilities, will be dealt with in detail in the Tribunal's separate liability judgment. The unexpected strike-out application caused the Claimant significant distress and she was not able to respond to it in closing submissions. The Tribunal therefore gave her 14 days in which to make written submissions. We considered the Respondent's written application and oral submissions and the Claimant's written submissions in reaching our conclusions.

2. The Claimant has dyslexia, ADHD and autism and the Tribunal has found that she was disabled because of those conditions.

3. The application to strike-out the claims was based on the Claimant's conduct during the Tribunal hearing.

4. The Tribunal has not been presented with formal witness statements about events in and out of the Tribunal. The Tribunal's observations and conclusions about what happened during the Tribunal are as follows:

    4.1 The Claimant was plainly very distressed during much of the Tribunal hearing. She was frequently tearful. When cross-examining the Respondent's witnesses, there were occasions when she visibly had to control her breathing before each question in order to ask it. Sometimes, Mr Massingham asked the questions instead and sometimes the Tribunal suggested that the Claimant ask the questions of the Judge, who could then direct them to the witness. When being questioned, the Claimant was often visibly distressed. In discussion with her, the Tribunal agreed that the questioning should sometimes continue when she was distressed, because she found it easier to regain her composure in that way, rather than taking a break. Sometimes that did not work, and the Tribunal decided to take a break in any event.

    4.2 The Tribunal had no doubt whatsoever that the Claimant's distress and difficulty in the hearing were entirely genuine. In reaching that conclusion, the Tribunal noted and took at face value the Respondent's assertion that they saw the Claimant leaving the Tribunal smiling and laughing, sometimes shortly after being very distressed in the Tribunal. Those two things are not necessarily inconsistent. For example, somebody might simply be relieved to be leaving the Tribunal, or might recover quickly from an episode of distress, or might be putting a brave face on it. From the Tribunal's own observations, we had no doubt about the Claimant's distress and difficulty.

    4.3 The Claimant is evidently someone who prepares thoroughly and in detail. She had prepared detailed questions for all of the witnesses, and she revised them during the course of the hearing after she gained a better understanding of what was required following the evidence of the first witness. That work was being done outside the Tribunal sitting day. The Claimant was travelling from near Malton to Leeds each day. She told the Tribunal more than once that she was struggling to sleep.

    4.4 The Claimant has dyslexia, autism and ADHD. As addressed in more detail in the liability judgment, as a result of her autism and ADHD the Claimant struggles with impulsivity. She may say what she thinks without stopping to consider whether it might offend someone. She is able to "mask" her behaviour to some extent. This takes significant energy. Change without notice can be a challenge for the Claimant. One of her most challenging symptoms to manage is emotional regulation. The Claimant has high justice sensitivity. The Claimant can be literal in her communication and speak in a way that seems blunt or rude to a non-autistic person.

    4.5 It is well-established and well-understood that autistic people who are able some or most of the time to "mask" their behaviour may still experience autistic meltdowns or unregulated behaviour. That does not mean that they are choosing to switch their autistic behaviour on or off, nor that their behaviour is a matter of choice. Rather, they may simply no longer have the energy or reserves to maintain the "masking" or may be unable to do so in stressful or distressing circumstances.

    4.6 The Respondent's suggestion that the Claimant's questioning of Mr Glover "demonstrated that she was capable of regulating her behaviour when

questioning a witness in this claim" suggests a fundamental misunderstanding of autism and ADHD.

4.7 The Tribunal noted that in the hearing room most of the Respondent's witnesses did not look at or interact with the Claimant or her partner and supporters at all. Even when giving their evidence, most of them turned their chair to face the Tribunal and did not look at the Claimant when she spoke to them.

4.8 During the hearing, there were numerous occasions on which the Claimant's behaviour became unregulated. She sometimes raised her voice, had outbursts, or commented inappropriately about questions or answers. Sometimes she directed criticism towards the Respondent's witnesses, observers or representative.

4.9 Again, it did not appear to the Tribunal that any of this behaviour was "calculated", "designed" to make the witnesses feel uncomfortable or to "derail" their evidence, nor an act of "retaliation." The Claimant undoubtedly felt strongly that those she was questioning had treated her badly, but she had prepared proper, detailed cross-examination questions for them. Sometimes, in the course of putting those questions or hearing the answers to them, or being questioned herself, she lost her composure. She made efforts to regain it each time, and frequently apologised when she had done so. The Tribunal had no doubt that the Claimant was doing her best to cross-examine the witnesses in an appropriate way and to answer questions in an appropriate way. Sometimes she was unable to maintain that.

4.10 This was entirely consistent with the Claimant's ADHD and autism, particularly in the context of her perception of the events that give rise to these claims; the stress and anxiety of preparing for the Tribunal hearing; and the stress, anxiety and exhaustion associated with the hearing itself.

4.11 No concern was raised by the Respondent's representative during the hearing that the Claimant's conduct was affecting the witnesses' ability to give their evidence, or might do so.

4.12 The Tribunal regularly reminded the Claimant of how she should conduct her questioning and of the importance of keeping things professional rather than personal.

4.13 We deal next with the specific incidents identified in the strike-out application.

4.14 The Respondent has not identified who the first witness referred to in the strike-out application was. It is not possible to address any specific concern in those circumstances.

4.15 Mr Townsend was asked a question relating to his children. This happened towards the end of his evidence, on the second day, on which the Tribunal had agreed that he could give evidence from home by CVP and the Claimant had agreed to that, in order to assist Mr Townsend and despite that not being her preference. The Claimant was exploring with him whether there were differences between her account of what was said at a meeting and Mrs Mackereth's notes. The Claimant said that she had said that PR "banged" the table and that Mrs Mackereth had recorded that as "pointed at" the table. Mr Townsend said that that was "the same thing." The Claimant asked, "If I point at your children or bang them, it's no different?" Mr Townsend objected to the question and the Judge put a different question exploring the same point. Mr Townsend answered it, "I saw her comment as pointing at the table [he demonstrated] no different

from banging." The Claimant apologised for her question when Mr Townsend expressed his concern. Mr Townsend continued to answer questions for around an hour more, without any apparent difficulty.

4.16 Neither Mr Townsend nor Mr Hemsi raised any concern with the Tribunal about any "look" the Claimant gave Mr Townsend before he gave his evidence.

4.17 Miss Spencer gave her evidence on Thursday 13 and Friday 14 June 2024. She attended the hearing unexpectedly as an observer on Tuesday 18 June 2024. That was the second day of the Claimant's cross-examination. There had been a discussion the previous week about Ms Pearce attending as note-taker with Mr Hemsi, which had caused the Claimant distress. Mr Hemsi had confirmed that Mrs Mackereth would be attending for the rest of the hearing. That led to a discussion about letting the Claimant know in advance if there was to be any change to that plan. The Claimant was not told in advance that Miss Spencer would be attending on 18 June 2024 as an observer. The Claimant explained at the start of the hearing that Miss Spencer's unexpected attendance and presence in the hearing room were causing her significant distress. The Judge sought to explore that with her. The Claimant said words to the effect that she had listened to Mr Glover the previous day answering questions about some of Miss Spencer's actions, and saying that they had not given him cause for concern. The Claimant said that she had been sitting there thinking, "If she set me on fire in the glass boardroom would that give you cause for concern?" The Judge explained that Miss Spencer was entitled to be present and that the Tribunal could not pre-judge the outcome. The Judge tried to encourage the Claimant to remember that the Respondent's representatives were "just doing their jobs" and the Claimant replied, "like the Nazis." The Judge reminded the Claimant of the need to keep things professional. The Claimant then spent the rest of the day being cross-examined. Miss Spencer chose to remain in the hearing room.

4.18 The Claimant did at one point ask Mr Andrew, "Are you proud of yourself, Darren, are you proud?" She did not scream at him, but she did ask the question in a loud and uncontrolled way. She asked her prepared questions before and after that in a polite way. Mr Andrew answered the questions before and after that. Neither he nor Mr Hemsi raised a concern that this had affected Mr Andrew's ability to give evidence at the time.

4.19 During Miss Spencer's evidence, the Claimant asked Miss Spencer about her decision to conduct the grievance appeal in writing and to require a written response from the Claimant by 4 January 2023. Miss Spencer said that "from a wellbeing perspective" she wanted to deal with it as quickly as possible. The Claimant did react to that answer by loudly and sarcastically repeating the words "wellbeing perspective". She did at other times during her evidence make "editorialising" comments. The "wellbeing perspective" exchange took place during the first afternoon of Miss Spencer's evidence. She continued to answer the Claimant's questions afterwards. She resumed her evidence the next morning. Neither she nor the Respondent's legal representative raised a concern at that stage about the Claimant's conduct or any impact on Miss Spencer's ability to give her evidence.

4.20 The Claimant did make a number of disparaging comments about Mr Hemsi during the course of the hearing. This included at around 2.30pm on the second day of her evidence, when the Claimant was clearly becoming increasingly

distressed and unable to regulate herself. She said at that stage that she would like to say that she believed him, but she did not because it was him. He had tortured her for 12 months. He could not even ask proper questions. It was embarrassing. The Judge again reminded the Claimant to keep things professional, explained that Mr Hemsi was doing a job, and encouraged her to think about his cross-examination questions as an opportunity to explain why the Respondent's version of events was incorrect, if that were so. The Tribunal took a break for the Claimant to compose herself. After the break, the Tribunal reminded Mr Hemsi that he still needed to explore issues relating to disability, which he did. He then concluded his remaining questions.

Legal principles

5. Under Rule 37 of the Employment Tribunal Rules of Procedure 2013, the Tribunal can strike out all or part of a claim, among other reasons if the manner in which it has been conducted by the Claimant has been scandalous, unreasonable or vexatious.

6. Scandalous means irrelevant and abusive of the other side; vexatious means pursued not with the expectation of success but to harass the other side or out of some improper motive. It includes conduct that is an abuse of process, or that has the effect of subjecting the other side to inconvenience, harassment and expense out of all proportion to any likely gain: see *Bennett v Southwark London Borough Council* [2002] ICR 881, CA; *Attorney General v Barker* [2000] 1 FLR 759, QBD (Div Ct).

7. If the Tribunal finds that a party's conduct of the proceedings has been scandalous, vexatious or unreasonable, it must then go on to consider whether a fair trial is still possible. A striking-out order is not regarded simply as a punishment, If a fair trial is still possible, the case should be permitted to proceed. Even if a fair trial is no longer possible, the Tribunal must consider whether striking out or some lesser remedy would be an appropriate response: see *De Keyser Ltd v Wilson* [2001] IRLR 323, EAT; *Bolch v Chipman* [2004] IRLR 140, EAT; *Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA.

8. A fair trial may be no longer possible in cases of witness intimidation. The cases in which a fair trial has been found not to be possible, and striking out has been found to be appropriate, tend to be those where there has been verbal or physical intimidation of a witness, leading to unwillingness or inability of the witness to give evidence, or to give accurate evidence. In *Wong v Royal Mail Group Ltd* Case No 2500163/22, on which the Respondent relies, the claimant pursued a campaign of intimidation against a witness, leading to the witness being put on anti-depressants, installing CCTV outside her home and that of family members, and reporting the matter to the police. That led to the conclusion that the witness might be reluctant or refuse to give evidence.

Tribunal's conclusions

9. The Tribunal was not satisfied that the Claimant's conduct of the proceedings was scandalous, vexatious or unreasonable, when viewed in context, in particular in the context of her ADHD and autism and the effect of those upon her. Undoubtedly it would have been preferable if she had been able to regulate her behaviour throughout

the hearing. No doubt it was difficult and unpleasant for the Respondent's witnesses and representative to experience. However, that should have been moderated by their knowledge of her ADHD and autism and the effect of those conditions upon her. The Claimant's level of distress and difficulty at the hearing was readily apparent at the Tribunal and would have been readily apparent to the witnesses. The Tribunal found that the Claimant was not deliberately setting out to upset, derail or retaliate. Her conduct was not calculated and it was not designed to cause difficulty. It was the conduct of somebody with ADHD and autism, who perceived that they had been treated very badly by the Respondent's witnesses, and who was at times struggling with emotional regulation during a long and stressful hearing. In that context, we found that it was not scandalous, vexatious or unreasonable.

10. However, even if it had met that threshold, there was no basis whatsoever for concluding that a fair trial was no longer possible. The Respondent did not advance any argument at all about why it said a fair trial was no longer possible in its written submissions. It referred to case law about witness intimidation, but did not provide any evidence, information or argument about how the Claimant's conduct in this case led to a fair hearing no longer being possible or how it affected any specific person's ability to give evidence. As we have noted, all the Respondent's witnesses gave their evidence without any apparent difficulty. There was no indication that anybody's ability to give evidence was impacted by the Claimant's conduct either at the time or subsequently. No concern was raised with the Tribunal at any point during the hearing that the Claimant's conduct was affecting anybody's ability to give evidence. The events about which Miss Spencer particularly complains took place after she had given her evidence.

11. Applying the relevant legal principles, therefore, the Tribunal reminds itself that striking-out a claim is not a punishment. It is appropriate only when a party's conduct has rendered a fair trial no longer possible and when there is no step short of striking out that will put matters right. That test is not met, for the reasons explained.

Employment Judge Davies
29 July 2024