EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103190/19

Held on 19 November 2019

Employment Judge N M Hosie

Mrs K Mutch	**Claimant** **Represented by** **Ms L Neill - Solicitor**
Ban-Car Hotel Limited	**Respondent** **Represented by** **Mr M W Anderson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application by the respondent's solicitor to strike out the claim or alternatively for a Deposit Order is refused.

REASONS

1. The claimant brought complaints of disability discrimination and for notice pay. The claim is denied in its entirety by the respondent. Also, it is not conceded that the claimant was disabled in terms of the Equality Act 2010.

2. The respondent's solicitor applied for the claim to be struck out. This case came before me, therefore, by way of a Preliminary Hearing to consider whether the claim should be struck out as being *"vexatious"*, or having *"no reasonable prospect of success"*, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"); or whether a Deposit Order should be made, on the basis that the claim has *"little reasonable prospect of success",* in terms of Rule 39.

3. At the Preliminary Hearing I heard evidence from the claimant and submissions by the parties' solicitors. Documentary productions were also lodged by the parties' solicitors ("C" and "R").

Respondent's Submissions

4. In support of his submissions, the respondent's solicitor referred to the following cases:-

Attorney General v Barker [2000] EWHC 453
Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330
Anyanwu v Southbank Student Union [2001] ICR 391
Chandhok v Tirkey [2015] ICR 527
Ahir v British Airways PLC [2017] EWCA Civ 1392

5. He confirmed that he was not only seeking a strike out on the basis that the claim has *"no reasonable prospect of success"* but also that it is *"vexatious".*

6. He readily accepted that it was clear from the case law, and such cases as ***Ezsias***, that the test for strike out on the basis of a claim having no reasonable prospect of success is a high one and would be the exception but maintained that in the particular circumstances of the present case it was appropriate.

7. He referred to the following passage from the Judgment of the Court of Appeal in ***Ezsias*** at para 29:-

> *"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospects of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation".*

8. The respondent's solicitor submitted that that "example" was the position in the present case.

9. He referred to the following passage from the Judgment of Lord Steyn in ***Anyanwu*** at para 24:-

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and a proper determination is always vital in our pluralistic society".*

10. He also referred to the Judgment of Lord Hope in ***Anyanwu*** at para 39:-

> *"Nevertheless I would have held that the claim should be struck out if I had been persuaded it had no reasonable prospect of succeeding at trial. The time and resources of the Employment Tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail".*

11. The respondent's solicitor submitted that the more recent case law demonstrated a *"more pragmatic and flexible approach".* He referred to the following passage from the Judgment of Mr Justice Langstaff at para 20 in ***Chandhok***:-

> *"There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; nor where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his Judgment in **Madarassy v Nomura** [2007] ICR 867): "only indicate a possibility of discrimination.*

> *They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".*
>
> *Other claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision".*

12. Finally, so far as the relevant case law was concerned, the respondent's solicitor referred to the following passage from the Judgment of LJ Underhill in ***Ahir***, at para 16:-

> *"Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment".*

13. At para 23, LJ Underhill made reference to the *"inherent implausibility"* of the claim succeeding. The respondent's solicitor submitted that that was the position in the present case.

Respondent's submissions on the claimant's case

14. The claimant maintains that she was dismissed, without notice, on 1 December 2018. She alleges that her dismissal was *"intimated"* when "Tina", the Director and proprietor of the respondent Company, *"screamed at her to get out"* at the conclusion of an allegedly unfair disciplinary process.

15. This is disputed. The respondent maintains that the claimant, *"terminated her own employment without notice on Saturday 1st December 2018*".

16. The claimant further maintains that she was, *"singled out and subjected to detriments because of her disability".*

17. The respondent's solicitor referred me to the claimant's "Facebook entries" (R3). He referred, in particular, to two "posts" by the claimant on Saturday 1 December 2018 to "Tina" (R3/9). The first post at 12:08 was in the following terms:-

> *"Tina I'll give Teresa my chef's trousers jackets ect I know I've lost my deposit but your out order shouting at me calling me a lier I left my last job get your facts right slander is a bad thing. Susans a lier I'll proof it see u at court I'm taking to for* ***for having no choice to leave*** *(my emphasis). I have proof of u shouting yelling at me calling me lier. U beleave Susan all you like don't care but you are not getting away with shouting at me again. Slander speak about me in u kitchen I'll take u for slander and rest u staff. See u in court you have no idea what goes on but one thing bullying in u kitchen u did nothing. U went to far Tina I have proof my solicitor will hear u yelling at me in Monday u went to far I had no choice* ***to just walk*** *(my emphasis) u listen about gossip u have no idea about me but u will Susan is nothing but a lier enjoy u Christmas u will need it picking on me for no reason bye "* [sic]

18. The second post was at 16:18 and was in the following terms:-

> *"Just so u know I've contacted my solicitor Tina u were out order today big time u listened to Susan's gossip I know it was here u told u stuff about me. U need to treat u staff better shouting at me in front other members of staff and calling me a lier u went way to far. And u allow Karen and Susan to still talk about me when u left kitchen. I'm taking u for discrimination u know damn fine I've bad depression treating me like that that is disgusting see u in court Tina I have a strong case against u allowing bullying in new kitchen when u knew damn well. I want my wages due holiday pay deposit back and my share of tips u shouted one time to many. Listening to Susan's lies I have proof did not say all that to her. U and Karen had a pick of me any opportunity glad u protect the bullies at bancar if I here gossip from today from any of u employees my solicitor will deal with it don't talk about me or u staff. U don't know how to treat people disgusting people will know what u like I stood up for myself Karen is a bully see that now Susan is gossip u will see when truth comes out.* ***I walked out forced out by your aggressive manner*** *(my emphasis). Out order. U have no idea what happens in kitchen no more messages my solicitor dealing with u bullying allowing it to happen and picking on me in front of staff out order big time"* [sic].

19. The respondent's solicitor submitted that these posts did not suggest that the claimant had been dismissed, as she alleged, and nor was there any reference to a disciplinary process.

20. Further, so far as the allegation of bullying in October 2018 was concerned, the respondent's solicitor referred me to other communications which the claimant had with "Tina". He referred in particular, to a post on 29 October 2018 at 10:56 (R3/1/2) and maintained that while this exchange addresses the "tense atmosphere in the kitchen" there is "nothing about bullying":-

> *" Morning Tina due to the problem last nite I have put in writing what I said I am still very upset about last nite. Yes I did tell Eileen that chef who I call Karen did tutt at me on Friday nite I never said last nite. Not once did I say tuna your name was never brought up once. Also I said I liked working with Teresa I never once said she was good chef bad chef. Levi was one said she did not like Teresa and did not like working with her. Yes I should of went to chef Karen and told her but it was brushed if as I felt all 3 of us said things not just me. Levi was rude to me 3 times on Sunday nite not once did I say anything to her I ended up in tears Eileen saw this I let it go. Hands feet have been added on to what I said I think feel all the blame was not on me. I under stand u was very angry it showed but I would have liked to have got my side across this has left me very upset. I did send text to Karen telling her my side. Every one was tripping over every one I see Elaine likes to do starters herself. I really don't know what to say I like chef Karen she's very good at her job if I upset her it was never my intension. And I would never talk about u Tina never. Thanks for taking time to read this* ***Karen****." [sic]*

21. The respondent's solicitor submitted, therefore, that the fundamental facts which provide the basis for the claim are, "*misplaced and contradicted by the claimant's contemporaneous statements"*. That is especially so in relation to the issue of whether the claimant was dismissed, as she maintains, or whether she resigned as the respondent maintains. It was submitted that, *"these Facebook posts are at odds with the claimant's assertions. Further, there is no assertion either in these posts that this had anything to do with the claimant's alleged disability".*

22. It was submitted, that because of these *"inherent contradictions"* there was, "*a lack of any genuine substance"* to the claimant's averments in the ET1 claim form.

23. While the respondent's solicitor accepted that a strike out is exceptional, he relied on the Judgment in ***Ezsias***, in particular, on the basis of what he maintained were *"undisputed contemporaneous facts*", namely the claimant's Facebook posts.

Claimant's evidence

24. The claimant was referred first of all by her solicitor to the Facebook communications she had with "Tina", shortly before she started to work at the hotel (R3/1). She accepted that she *"might have said"* that she has *"a slight stammer"* but said that this was *"just a saying"*. She wanted to make Tina aware of this before they met. She explained that she sent a number of Facebook messages as she found it easier to communicate in that way.

25. The claimant accepted that she sent the communication on 29 October 2018 at 10:56 (R3/1/2) which the respondent's solicitor referred to. She said that the Head Chef was *"slagging her off"* and when she confronted her about this, *"she didn't take it kindly"* and Tina had supported the Head Chef rather than her.

26. I enquired what the Head Chef was *"slagging her off"* about. She said that she (the Chef) *"had problems with her".*

27. In a later post on 29 October the claimant said this (R3/3):-

> *"I'm taking from your reaction. Last nite I have been sacked there for I said what I said but had been picked up wrong way, yes you was very angry at me Tina I've never been spoken to like that before. As I know my place I try to tell you what happened but felt best I went as I saw u were angry to talk to. If I am sacked can you please tell me thank you". [sic]*

28. Tina responded as follows (R3/3):-

> *"I didn't sack you Karen. I told you to leave the hotel last night as I wasn't willing to discuss at that time of night, when we were locking up. Levi was on veg last night not starters. No one talks about each other Karen, we all get on fine, although like normal kitchens tension can run high when busy, but everyone just gets on. Nothing was mentioned to me about depression Karen. When asked about your health and fitness you said nothing. I*

have asked you to come in and discuss with Karen (Head Chef) and myself therefore it's up to you. We then will need to pull everyone in to discuss this further. Tina"

29. The claimant was then asked about the post on Saturday 1 December at 12:08 (R3/9) the day her employment ended. She accepted that she was the *"Facebook User".* She accepted that she had made this post but maintained that she did not *"walk out*". She said that she was telling Tina that she was, *"taking her for discrimination".*

30. So far as the post at 16:18 was concerned (R3/9), she claimed that, *"Tina and her witness"* had *"cornered"* her and that they were swearing at her, *"get out, get out, get out".* She said that she took this to mean that she had been sacked. She said that *"the CCTV will prove this".*

Claimant's submissions

31. In support of her submissions the claimant's solicitor referred to the following cases:

Bennett v Southwark LBC [2002] EWCA Civ 223
Attorney General
Ezsias
James v Blockbuster Entertainment Ltd [2006] EWCA Civ 684
Balls v Downham Market High School & College [2010] UKEAT0343/10/1511
Anyanwu
Mechkarov v Citibank NA [2016] ICR 1121
AVB and another [2009] UKEAT0450/08/1305
Ahir
Dossen v Headcount Resources Ltd and others [2013] UKEAT0483/1/-0804
Sharma v New College Nottingham [2011] UKEAT0287/11/0112
H v Ishmail UKEAT/0021/16

32. The claimant's solicitor also referred to her letter of 23 July 2019 to the Tribunal, by way of response to the respondent's strike out application, the terms of which she adopted as part of her submissions. The letter is referred to for its terms. In the

letter she made reference to a number of the above cases. In particular, with regard to the respondent's contention that the claim was vexatious, she referred to the following passage from the Judgment of LJ Bingham in ***Attorney General*** :-

> *"The hallmark of a vexatious proceeding is, in my judgment, that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".*

33. The claimant's solicitor went on in her letter to say this:-

> *"In our view, the respondent has failed to establish that the claimant has brought a claim of this nature entirely. The respondent has made vague reference to some of the points of the case with which they disagree, namely the circumstances surrounding the cessation of the claimant's employment including:*
>
> *(a) a question of whether the claimant resigned or was dismissed;*
>
> *(b) the respondent's knowledge or otherwise of the claimant's alleged disability;*
>
> *(c) the extent and impact of any impairment; and*
>
> *(d) the extent, if any, to which any disability was a factor in the cessation of the claimant's employment"*
>
> *These questions which the respondent highlight, are simply matters which would be for the Tribunal to determine in a disability discrimination claim. They are not, by any means, exceptional. It appears that the respondent is objecting to what is an ordinary disability discrimination claim. The grounds upon which the respondent seeks to strike out the claim are ordinary questions for the tribunal.*"

34. She also referred to the Judgment of the Court of Appeal in ***Ezsias***, that, it would only be, *"very exceptionally, that a case should be struck out without the evidence being tested".*

35. She then went on in her submissions to say this:-

> *"For the claimant, it is evident that there is an arguable case in law. Upon examination of the case, we have identified four heads of claim on the basis of disability discrimination. The claimant suffers from depression and has had a significant speech impediment since birth. Her communication is impaired. It is clear that such a disability would impact all day to day activities which involve talking.*
>
> *The claimant was impeded in her ability to stand up for herself which the respondent took advantage of and exploited. The claimant advises she was the victim of workplace bullying as a result of her communication difficulties. The claimant was held to a completely different standard due to her disability and was discriminated against and eventually dismissed as a result. The claimant was patronised by other employees, who drew on paper rather than speaking to the claimant. The claimant was verbally abused and characterised as a liar and a troublemaker during her employment. Due to these assertions, it is clear that the claimant has an arguable case in law, which must be explored by the Employment Tribunal in line with the overriding objective".*

36. So far as the alternative submission by the respondent's solicitor was concerned, that the claimant should be required to pay a deposit on the basis that the claim has *"little prospect of success",* the claimant's solicitor submitted that similar considerations to those relating to a strike out application applied (***Tree v South East Coastal Ambulance Service*** UKEAT/0043/17).

37. She submitted, therefore, that a Deposit Order would also not be appropriate.

38. In this connection, she also referred to ***Sharma*** and submitted:-

> *"The EAT held that it was wrong for a tribunal to make a deposit order in respect of a race discrimination claim where the contemporaneous*

documentation did not support the claimant's version of events. The respondent has suggested that the claimant has made previous statements which contradict her claim. The respondent has neither produced these statements, nor advised the Tribunal of the content."

39. At the Preliminary Hearing the claimant's solicitor also amplified her previous written submissions in her letter of 23 July. She referred to para 6 of the Judgment of the Court of Appeal in ***Ahir*** where it would have been necessary, for the claimant to succeed with her employment tribunal claim to find that six separate Managers, *"had each permitted the background issues of the claimant's protected acts to taint their decision making, although there was no evidential basis for stating that each of these Managers was aware of those issues (those protected acts) …".* She submitted that the present case was *"nothing like that*".

40. She also drew to my attention that there was very little by way of response from the respondent to the claimant's Facebook posts. The claimant's employment came to an end *"in difficult circumstances"* and it was clear from her posts that she felt aggrieved as there was an *"aggressive situation at work".* However, the Facebook posts, *"are not the entirety of the dialogue"* as there were also *"face to face"* discussions.

Discussion and Decision

41. The test for strike out of a discrimination complaint is a high one. Lord Steyn said in ***Anyanwu*** that as discrimination cases tend to be *"fact sensitive"* strike out should only be ordered, *"in the most obvious and clearest cases".* Lord Hope also said in that case that, *"discrimination issues … should, as a general rule, be decided only after hearing the evidence".* However, I also remained mindful, of the Judgment of LJ Underhill in ***Ahir***, which the respondent's solicitor drew to my attention, that: *"There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example where the alleged facts are conclusively disproved by the productions"* and that in such circumstances, *"Employment tribunals should not be deterred from striking out claims, including*

discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment".

42. For the purposes of determining the issues with which I was concerned in the present case I took the claimant's averments at their highest value. In other words, I proceeded on the basis that the claimant would be able to prove all the facts she avers.

43. First of all, I had little difficulty deciding that this claim was not "vexatious". It was clear that the test in the ***Attorney General*** case, to which I was referred, had not been met.

44. What then of the prospects of the claim succeeding? The claimant's Facetime posts, to which I was directed by the respondent's solicitor, appeared to be consistent with the respondent's position that the claimant resigned and was not dismissed as she alleged. However, that related only to the issue of how the claimant's employment ended. There were a number of discrimination complaints and many other issues to be addressed. Also, so far as the termination was concerned, the posts were not the full picture. As the claimant's solicitor submitted, the Facebook posts were *"not the entirety of the dialogue*". There was relevant evidence to be heard from witnesses of what was done and said on 1 December 2018 that resulted in the claimant leaving (using that word in a neutral sense) and not returning to work for the respondent.

45. While there was undoubtedly some force in the submissions by the respondent's solicitor on the basis of the Facebook posts in respect of the issue of credibility, in my view, particularly having regard to the case law, it would be misguided to determine that the claim has *"no reasonable prospect of success"* or even *"little reasonable prospect"* without hearing and evaluating the full evidence, including

evidence about the circumstances leading up to and the events of 1 December 2018 when it is agreed the claimant's employment ended.

46. Further, the claimant's alleged dismissal is only part of the claim. The claimant's solicitor has intimated complaints of direct discrimination in terms of s.13 of the Equality Act 2010, discrimination arising from disability in terms of s.15, a failure to make reasonable adjustments in terms of s.20 and harassment in terms of s.26.

47. I was unable to conclude, therefore, that the claim has either, *"no reasonable prospect of success"* or *"little reasonable prospect of success".* The applications by the respondent's solicitor, therefore, are refused.

Further and Better Particulars of the claim

48. However, the issue of strike out does not end there as in my view the various complaints which the claimant's solicitor seeks to advance are lacking in specification and Further and Better Particulars are required.

Burden of proof provisions

49. Each of the discrimination complaints requires a claimant first to establish facts that amount to a *prima facie* case. S.136 of the 2010 Act provides, that once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove a non-discriminatory explanation.

50. ***Igen Ltd v Wong*** [2005] IRLR 258 remains one of the leading cases in this area. In that case the Court of Appeal established that the correct approach for an Employment Tribunal to take for the burden of proof entails a two-stage analysis. At the first stage, the claimant has to prove facts from which the Tribunal could infer the discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then "shifts" to the respondent to prove – again on

the balance of probabilities – that the treatment in question was "in no sense whatsoever" on the protected ground.

51. The Court of Appeal in ***Igen*** explicitly endorsed guidelines previously set down by the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205.

52. Further, in ***Bahl v The Law Society and others*** [2004] IRLR 799, the Court of Appeal upheld the reasoning of the EAT and emphasised that unreasonable treatment of a claimant cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof, the principle is still valid. In other words, unreasonable treatment is not sufficient in itself to raise a *prima facie* case requiring an answer. As the EAT said in ***Bahl*** at para 89: *"… merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct".*

53. Further, in the recent case, ***Chief Constable of Kent Constabulary v Bowler*** UKEAT/0214/16/RN, the EAT held that the incompetent handling of a grievance and a lackadaisical attitude of the investigator was insufficient to give rise to an inference of discrimination. The EAT also reiterated the caution expressed in ***Igen*** against too readily inferring discrimination, merely from unreasonable conduct while there is no evidence of other discriminatory behaviour.

54. So far as the present case is concerned, the claimant is required to: *"set out with the utmost clarity the primary facts on which an inference of discrimination is drawn"; it is the act complained of and no other that the Tribunal must consider and rule upon"* (***Bahl***).

55. In the Agenda which was attached to her letter of 23 July 2019 the claimant's solicitor provided by way of an Appendix, Further and Better Particulars of the direct discrimination and harassment complaints. However, the claim form has not been amended in terms thereof. Nor, so far as I am aware, were Further and

Better Particulars provided in respect of the complaints of discrimination arising from disability and a failure to make reasonable adjustments.

56. The claimant's solicitor alleges "workplace bullying". However, in terms of the burden of proof provisions, the claimant has first to establish a *prima facie* case and a causal connection between the alleged detriments and her disability. I have reservations as to whether she has done so on the basis of the current pleadings. I have concerns, with reference to ***Bahl*** and **Madarassy**, that all that is being alleged is unreasonable conduct which is insufficient for a discrimination complaint.

57. Accordingly, I direct the claimant to provide Further and Better Particulars of the discrimination complaints. Each of the complaints should be set out under separate headings with details of the act or acts complained of which are said to amount to less favourable/unfavourable treatment; if required in terms of the relevant statutory provision, the identity of the person or persons with whom the claimant compares her treatment; and the basis upon which it is alleged the less favourable/unfavourable treatment is said to have occurred because of her disability.

58. She is directed to do so, by way of an application to amend, within 14 days from the date of issue of this Judgment, in writing to the Tribunal with a copy to the respondent's solicitor. I further direct the respondent's solicitor, if so advised, to respond in writing to the Tribunal and at the same time copy the claimant's solicitor within 14 days of receipt of these Further and Better Particulars.

59. I shall then revisit the issue of the prospects of the claim succeeding on the basis of the pleadings, as amended and any further written submissions which the parties' solicitors wish to make as to the prospects of the various complaints succeeding.

60. I also remain mindful that the respondent's solicitor has not conceded that the claimant was disabled in terms of the 2010 Act and if the claim is to proceed it may

be necessary to fix a Preliminary Hearing to determine that issue. However, I encourage the parties' solicitors to liaise in this regard so far as the production of medical evidence and details of the impact of the claimant's *"impairment"* on her ability to carry out "normal day - to - day activities" is concerned

Employment Judge: **Nicol Hosie**
Date of Judgment: **10 January 2020**
Date sent to parties: **13 January 2020**