



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Macedo

**Respondent:** The Goring Hotel Limited

**Heard at:** (by video) **On:** 21 February 2022

**Before:** Tribunal Judge A Jack, acting as an Employment Judge

## Appearances

For the claimant: Miss Serena Crawshay-Williams, counsel

For the respondent: Miss Amanda Trehwala, solicitor

# RESERVED JUDGMENT

1. The application to strike out paragraphs 5 to 13 and the second sentence of paragraph 14 of the claimant's grounds is refused.
2. Paragraph 35 of the claimants Grounds is struck out, since it refers to a protected conversation.

# REASONS

EJ Glennie had directed that there was to be a preliminary hearing to determine:

2.1 the Respondent's application to strike out paragraphs 5 to 13 and the second sentence of paragraph 14 of the claimant's grounds.

1. I reserved judgment in respect of two applications. My judgments are as set out above.

## Paragraphs 5 to 14 of the Claimant's Grounds

2. The respondent applied in the Grounds of Resistance for paragraphs 5 to 13 and the second sentence of paragraph 14 of the claimant's grounds to be struck out. This was on the basis that they make various allegations of racist acts or attitudes by Mr Andrews, which are irrelevant to the acts relied on (and listed in paragraph 43 of the grounds) to show constructive dismissal. They are therefore believed to have been

included to cause distress and embarrassment. Miss Trehalla further submitted that the claimant has been legally advised throughout, and has not brought a claim of race discrimination.

3. Miss Crawshay-Williams' submitted that the alleged acts are relevant to the allegation that the respondent failed to consider the claimant's grievance in a fair and reasonable way (made at paragraph 43a of the grounds). This was on the basis that as the claimant is not from the UK, the incidents amounted to belittling him. The reason why these incidents were included is that they relate to the alleged failure to deal with his grievance which concerned his being harassed by Mr Andrews on 14 May 2020 and being belittled by him.
4. Rule 37(1)(a) permits the Tribunal to strike out part of a claim if it is scandalous or vexatious. The meaning of "scandalous" in this context covers both the misuse of the privilege of legal process in order to vilify others and giving gratuitous insult of the court in the course of such process: *Bennett v London Borough of Southwark* 2002 WL 45435. The hallmark of vexatious litigation is that it has little or no discernible basis in law: *Attorney General v Barker* 2000 1 FLR 759.
5. The allegations in paragraphs 5 to 14 are relevant to the grievance which the claimant brought. The grievance related not only to the alleged incident on 14 May 2020 but also to other situations in which the claimant alleges he was belittled by Mr Andrews. Indeed, this is confirmed by paragraph 37 of the Grounds of Resistance. I therefore accept that these allegations were not included simply to vilify Mr Andrews or the respondent, but because they are relevant to the alleged failure to properly consider the claimant's grievance. For the same reason, I accept that their inclusion has a discernible basis in law, since they are relevant to the claim of constructive dismissal.
6. For these reasons, I refuse the application to strike out paragraphs 5 to 13 and the second sentence of paragraph 14 of the claimant's grounds.

### **Paragraph 35 of the Claimant's Grounds**

7. The respondent applied in paragraph 56 of the Grounds of Resistance for paragraph 35 of the Grounds of Claim to be struck out. This was on the basis that it refers to a protected conversation on 3 September 2020 between the claimant and respondent. The respondent made submissions in support of this application in its skeleton argument dated 14 February 2022.
8. Miss Crawshay-Williams pointed out that this second application was not mentioned when this hearing was listed, and argued that the respondent had therefore had less time to prepare for it than for the first application. Her instructions on this application had only been confirmed on the morning of the hearing. I asked her to make submission on the second application, since she did in fact have instructions.
9. Miss Crawshay-Williams argued that paragraph 35 of the claimants Grounds should not be struck out and applied for it to be amended instead, to add the following: "Ms Hunter said that if the Claimant did not

accept a monetary offer to leave, the Respondent would commence disciplinary action against the Claimant which could lead to his dismissal, despite the Respondent not having previously raised disciplinary issues with the Claimant.”

10. Section 111A(1) of the Employment Rights Act provides that evidence of pre-termination negotiations is inadmissible in any proceedings before an employment tribunal alleging unfair dismissal. Subsection (2) defines “pre-termination negotiations” as meaning any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee. Subsection (4) provides that subsection (1) applies in relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, only to the extent that the tribunal considers just.
11. Miss Crawshay-Williams argued that paragraph 35 should not be struck out as the conversation on 3 September 2020 was improper behaviour on the part of the respondent. This is because the respondent was threatening disciplinary action in order to induce the claimant to accept a monetary offer.
12. However even taking the facts to be as stated in the proposed amendment, I am not satisfied that this was improper behaviour on the part of the respondent. The respondent was saying, albeit for the first time, that it would commence disciplinary action, and that that *could* lead to his dismissal. That falls short of “An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee *will* be dismissed”, which is one of the examples of improper behaviour listed by ACAS in its *Settlement Agreements (under section 111A of the Employment Rights Act 1996): Code of Practice*.
13. I therefore order that paragraph 35 of the claimants Grounds should be struck out, since it refers to a protected conversation.
14. Miss Crawshay-Williams suggested that she had not had as long to prepare to deal with application as she would have liked. Taking account of the overring objective, the need to avoid the expense of holding more than one preliminary hearing, and that fact that Miss Crawshay-Williams had been able to obtain instructions in the time available, I am satisfied that it was appropriate to consider this application on the basis of the submissions made at the hearing. Further, anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Tribunal Judge **A Jack**,  
acting as an Employment Judge

26 February 2022

**Case Number: 2200334/2021**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
28/02/2022.

FOR EMPLOYMENT TRIBUNALS