EMPLOYMENT TRIBUNALS

Claimant: Mr B Wytrzyszczewski

Respondent: British Airways Plc

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford (in public) **On:** 16 December 2019

Before: Employment Judge Daniels (sitting alone)

Appearances:
For the claimant: Mr R Robison, FRU
For the respondent: Miss M Tutin, Counsel

JUDGMENT

1. The respondent's application to strike out all of the claims on the basis of scandalous, unreasonable or vexatious conduct of the proceedings by the claimant is not well founded and is dismissed.

2. The respondent's application for a deposit order is not well founded and is dismissed.

REASONS

Strike out

3. I shall start with reasons in respect of the strike out application.

4. The respondent submits that all the claimant's claims should be struck out on the basis of scandalous, unreasonable or vexatious conduct of the proceedings by the claimant.

5. These allegations relate to the fact that the claimant operated a public internet blog site in respect of which he made various postings, partly in respect of or relating to these proceedings (see pages 208 to 379 of the Bundle).

6. Amongst other matters the claimant is said to have:

a. *Posted a copy of an allegedly "without prejudice save as to costs" letter from the respondent's solicitors (237-238; 242) allegedly breaching without prejudiced privilege;*

b. *Posted a copy of the respondent's letter to the tribunal dated 18 October 2018 (239; 243-244) and the tribunal's correspondence to the parties dated 4 December 2018 (322). Such documents are claimed by the respondent to be private and confidential between the parties and tribunal, and, they say, ought not to be used for any collateral purpose;*

c. *Referred to the last preliminary hearing on 13 February 2019 as being public "so anyone can attend" (239) when the respondents aver that it was clearly a case management hearing conducted in private. That the claimant also indicated that he would publish a post giving details of what happened at the later (public) hearing.*

d. *Stated that "the employment tribunal confirmed during my first hearing that recording the meetings (even without anyone knowing about it) is permissible and can be used as evidence in proceedings against British Airways" (see page 311 of the bundle).*

e. *Repeatedly written, or copied communications, to senior management at the respondent (see pages 52; 98; 100; 114; 117), despite allegedly being told on 6 December 2018 and 5 April 2019 to direct all communications to the respondent's solicitors and not to write directly to employees or managers at the respondent.*

7. On 2 April 2019, the respondent drew this conduct to the claimant's attention and asked him to remove immediately the blog postings. He was strongly encouraged to seek legal advice and the respondent indicated that it may seek a strike out order and/or costs order in light of the claimant's conduct. While it was common ground that the claimant indicated he took this matter "seriously", the respondent says he did not immediately comply with the respondent's request to remove the blog posts.

8. It is alleged that the claimant then took deliberate and persistent steps to disregard the respondent's lawful and reasonable request. Firstly, that he positively stated he would not remove the posts (see page 318) and said he would no longer indicate when his next post would be published in order to avoid detection (see page 352).

9. Secondly, it is alleged that the claimant chose to deny that he had done anything wrong (117-123), and posted the respondent's letter dated 2 April 2019 and his response on his blog (see pages 318-327; 329-338).

10. He is alleged to have set out a clear and deliberate intention to continue posting about the tribunal proceedings by stating that "in the next post, I will tell you more about harassment at BA and how they like to deny it. It will be published in one week's time". This is alleged to amount to contumelious conduct by the claimant.

11. After the respondent set out its request for a strike out in its letter dated 17 April 2019 (125-127), the claimant then withdrew the posts on his blog which post-dated April 2018.

12. The respondent first intimated they were considering an application to strike out in their letter dated 2 April 2019. The claimant stated that he was opposing any such application on 17 April 2019. The respondent wrote with a formal application on 17 April 2019.

Relevant legal provisions

13. A claim may be struck out at any stage of the proceedings if:

    a. The claim has no reasonable prospect of success pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"):

    b. The manner in which the proceedings have been conducted by or on behalf of a party has been "scandalous, unreasonable or vexatious", pursuant to Rule 37(1)(b) of the ET Rules.

14. It has been held that there are two conditions for the exercise of power under Rule 37(1)(b), namely that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible: see **Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684. [2006] IRLR 630**, at [5] per Sedley LJ.

15. The starting point for the tribunal is then the test found in **Bolch v Chipman [2004] IRLR 140** in which the Employment Appeal Tribunal set out the correct legal test that should be applied when considering the question of whether or not a party's case should be struck out because their conduct has been vexatious and or scandalous.

16. At paragraph 55 and onwards the EAT sets out that the test should be:

    (1) There must be a conclusion by the tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.

    (2) Assuming that there is a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the notice of appearance must be struck out.

17. The EAT went on to refer to **De Keyser Ltd v Wilson [2001] IRLR 324** at paragraph 25 in which Mr Justice Lindsey had set out what is required before there can be a strike out of a notice of appearance or indeed of an originating application, is a conclusion as to whether a fair trial is or is not still possible.

18. That situation can be contrasted with the one dealt with in the EAT in **Chidzoy v BBC UKEAT/0097/17/BA** in which the claimant had ignored the instructions of the tribunal not to talk to anyone about their evidence in the break period while giving evidence at the final hearing. On this occasion the EAT upheld the Employment Tribunal's judgement that their trust in the claimant had broken down.

19. From the **Chidzoy** case it is clear that the test from **Chipman** is the correct test when considering an application under rule 37, and that the fundamental question the tribunal should be asking itself is whether a fair trial is possible or not.

20. Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question.

Without prejudice communications

21. In order to consider this issue, the tribunal must address the test in **Bradford and Bingley Plc v Rashid [2006] 4 All ER 705** in which the House of Lords addressed the question of what constitutes a communication that is 'without prejudice'. At paragraphs 71-75 of the judgement their Lordships make it clear that a without prejudice communication must be one in which there is a genuine attempt being made to compromise a dispute.

22. I also reminded myself of the key authorities on unambiguous impropriety.

The respondent's submissions on strike out

23. The respondent's position on the strike out was in summary as follows:

    a. All of the claimant's claims should be struck out on the basis of scandalous, unreasonable or vexatious conduct of the proceedings by the claimant, including allegedly posting confidential and/or privileged communications by or with the respondent and tribunal on a public forum. Alternatively, it was argued that a costs order should be made.

    b. The claim for detriment on grounds of making protected disclosure/s was brought out of time and limitation should not be extended, as it was reasonably practicable for the claim to be brought in time and it was not brought within a further reasonable period of time. The claims of direct sex discrimination and harassment related to sex and/or of a sexual nature should also be struck out on the basis that they are out of time and it would not be just and equitable to extend time.

The claimant's submissions

24. The claimant relied, amongst other things, on his article 10 rights of freedom of expression in relation to what he has published on his blog. The vast majority of the material on the claimant's blog is, he says, entirely innocuous and unexceptional. The claimant says he has every right to say what he likes about his experiences working for the respondent, subject only to the caveat that of course what he says must be true and not defamatory and/or an abuse of process. If the respondent seeks the claim that what has been said by the claimant is defamatory then he says that their potential remedy lies in a defamation claim in the High Court. The claimant says he has taken care to redact identifying information from most of the documents online and in this way, he has behaved responsibly.

25. The claimant also submitted that there had been no breach of tribunal orders and striking out would be a disproportionate and draconian step. This was partly as it

could not be possibly said that fair trial could not now take place. He also argued that there were respectable arguments as to why all of the claims were in time.

Was the letter of 2 April 2019 without prejudice?

26. It was agreed that this part of the hearing was dealt with in private for public policy reasons relating to without prejudice privilege. I found that it was a genuinely without prejudice communication and the case on unambiguous impropriety was not made out. In this case, it was clear to me that the letter was covered by without prejudice privilege. Reasons were given at the hearing, in private.

27. The parties agreed that those reasons should remain private, and/or I determined this was a necessary approach, not least as the reasons might otherwise publicly disclose details of the letter which was the whole purpose of this application.

What was the nature of the claimant's conduct?

28. I shall deal with each issue in turn. The first allegation is that the claimant

    a. *Posted a copy of an allegedly "without prejudice save as to costs" letter from the respondent's solicitors (237-238; 242) allegedly breaching without prejudice privilege;*

29. In this respect, I could not see that the claimant had disobeyed any order of the tribunal, as there had been no order made in respect of these issues and no unless order sought either. There had simply been an order for mutual exchange of documents.

30. At the time the claimant posted the without prejudice documents on his blog online he was a litigant in person and had had no access to independent legal advice about what was legal, or the way in which documents may or may not be used. There was no basis to suggest that his action was deliberate and intentionally improper. Without prejudice privilege is a complicated area of law and the proper ambit of this rule is not a point that a member of the public would necessarily appreciate, at least without advice.

31. I find that the claimant did not know he was potentially not allowed to refer to the content of such letters in public. So far as he may have used the without prejudice letter incorrectly or improperly, he did so inadvertently.

32. Furthermore, following a request from the respondents he promptly took down the material down off the website promptly. So far as there was any breach of any duty, this was plainly not repeated and was quickly addressed.

33. In addition, the letter from the respondent's solicitors dated 2 April 2019 in some respects potentially overstated the position, in law, by suggesting that the claimant could not make any postings about the case and he should "remove all blog postings" (not just those which referenced without prejudice matters etc) and "you should further desist from making any additional postings" which was a potentially unreasonable attempt by the respondent to shut the claimant down and fetter his ability to speak about the case at all. The respondent's solicitors appeared to be seeking to suggest that the claimant was not entitled to speak about the case at all. That was unfortunate. This is important context to the proper assessment of

the respondent's contention that the claimant had engaged in some form of serious or significant unreasonable conduct.

34. I do not find any unreasonable conduct of any significance here and/or I do not find that the proceedings had been conducted unreasonably in this respect. This was a minor issue, that was quickly addressed and there is, in my view, no basis whatsoever for finding that strike out would be proportionate or that a fair trial could not now be held. The respondent's determined submissions on these issues did not get anywhere near, in my view, to the relatively high level of unreasonable conduct and prejudice required by the case law to potentially justify strike out of all claims.

35. The second issue is whether the claimant "*Referred to the last preliminary hearing on 13 February 2019 as being public "so anyone can attend" (*239) when the respondents aver that it was clearly a case management hearing conducted in private. That the claimant also indicated that he would publish a post giving details of what happened at the later (public) hearing.

36. I am unable to find any breach of any tribunal order, on the facts, and in so far as there was an error this was plainly not repeated and was quickly addressed. In fact, the PH had originally been listed as a public hearing and only got turned back into a private one on the day as the jurisdictional issue was parked. There is no evidence that this was made explicit to the claimant or that he appreciated the difference or the change.

37. At the time the claimant was still a litigant in person and had had no access to independent legal advice about when a hearing would be treated as being in public or not. There was no basis to suggest that his comment was made deliberately and intentionally in conflict with what he knew to be the true position. The circumstances in which a hearing is public varies and is not a well known area of law. The fact a hearing could be listed a public and then be quickly converted into a private session is not a point that a member of the public would necessarily appreciate, at least without advice.

38. I find as a matter of fact that the claimant did not know the hearing had become a private one. So far as he may have described the position incorrectly or improperly, he did so inadvertently.

39. I find no unreasonable conduct and/or do not find that the proceedings had been conducted unreasonably in this respect. If I am wrong on this, this was a very minor issue, that was quickly addressed and there is no basis whatsoever for finding that strike out would be proportionate or that a fair trial could not now be held. The respondent's case got nowhere near the relatively high hurdle for strike out required by the case law.

40. The next issue is that the claimant allegedly stated that "*the employment tribunal confirmed during my first hearing that recording the meetings (even without anyone knowing about it) is permissible and can be used as evidence in proceedings against British Airways" (see page 311 of the bundle)".*

41. Again, at that time the claimant was still a litigant in person and had had no access to independent legal advice about when recordings of meetings were and were not inadmissible. There was no reasonable basis to suggest that his comment was

made deliberately and intentionally in conflict with what he knew. The circumstances in which recordings of meetings may be held admissible is a complex area of law, albeit the presumption is that relevant evidence is often held admissible, even if it was obtained in inappropriate or potentially inappropriate ways. The Employment Judge explained the position as to the possibility of these documents being admissible and I find that the words he apparently used were capable of a number of different interpretations or emphasis. The claimant did not know that he was possibly overstating the legal position as to admissibility of recordings, albeit in a very minor way, by saying such recordings are admissible rather than that they may be. So far as he may have described the position incorrectly or improperly, he again did so inadvertently.

42. I find no unreasonable conduct here and/or do not find that the proceedings had been conducted unreasonably in this respect. If I am wrong on this, this was a very small issue and there is no basis whatsoever for finding that strike out would be proportionate or that a fair trial could not now be held as a result. The respondent's case here got nowhere near, in my view, to the relatively high hurdle required to justify strike out under the above case law.

43. The claimant is then said to have: "*Repeatedly written, or copied communications, to senior management at the respondent (see pages 52; 98; 100; 114; 117), despite allegedly being told on 6 December 2018 and 5 April 2019 to direct all communications to the respondent's solicitors and not to write directly to employees or managers at the respondent"*.

44. I again find no unreasonable conduct in this respect and/or do not find that the proceedings had been conducted unreasonably in this respect. It is not unusual for a person who is concerned about apparently serious and ongoing safety and other issues to copy in senior management to letters. There also appeared to be potentially sound reasons why he did so, in view of the apparently disinterested management response to his safety disclosures. If those copied in did not wish to or intend to read them, they could of course simply do so. This was a very minor issue, that was quickly addressed and there is no basis whatsoever for finding that strike out would be proportionate or that a fair trial could not now be held. The respondent's case again got nowhere near the relatively high hurdle to strike out required by the case law.

45. It is important that the tribunal does not lose sight of proportionality when it is making its decision in reaction to the respondent's application. **In Blockbuster Entertainment Ltd v James [2006] IRLR 630** at paragraphs 20 and 21, the Court of Appeal which decided that lack of true attention by an employment tribunal to this principle meant that its decision to strike out a claim because of non-compliance without tribunal orders should be quashed.

46. As the Court of Appeal said in paragraph 21 "It is not only by reason of the convention right to a fair hearing vouchsafed by Article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: **see Re Jokai Tea Holdings [1992] 1 WLR 1196 at 1202E-H**. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structed examination. The particular question in such as case as the present is whether there is a less drastic means to the end for which the strike out power exists. The answer has to take into account the fact, if it is a fact, that the tribunal

is ready to try the claims, or as the case may be, that there is still time in which orderly preparation can be made…. Proportionality in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the interests of justice, upon their consequences."

47. In this case, I found no unreasonable conduct and/or no such conduct of any significance. There was no intentional breach of any order. There was no deliberate attempt to mislead anyone. The respondent had not applied for an unless order at any stage either, which was the usual first approach, before a strike out application.

48. There was no unreasonable conduct of any import or significance and/or I do not find that the proceedings had been conducted unreasonably in this respect.

49. So far as the claimant may have slightly overstepped the mark on what he could and could not do, this was a very minor issue, that was quickly addressed.

50. There is no sound basis whatsoever for finding that strike out of the claims would be proportionate or that a fair trial could not now be held.

51. I also saw no existing basis for granting any unless order at this stage (nor was one sought).

Reasons regarding application for deposit order

52. The respondent applied for a deposit order that the claims for automatically unfair dismissal of the claimant had little reasonable prospect of success. The application was dismissed.

53. The reasons for dismissing the application were in summary as follows based on a provisional view of some of the apparent facts.

Relevant law

54. At a preliminary hearing, if an employment judge considers that any specific allegation or argument in a claim or response has "little reasonable prospect of success", they can make an order requiring the party to pay a deposit to the tribunal, as a condition of being permitted to continue to advance that allegation or argument (Rule 39 (1) of the Employment Tribunals Rules of Procedure 2013 (ET rules)).

55. The test is not as rigorous as the "**no** reasonable prospect of success" test in rule 37 (1) a under which the tribunal can strike out a party's case. This was confirmed by Mr Justice Elias in **Van Rensburg v Royal Borough of Kingston-Upon-Thames and others UK EAT/0096/07; UKEAT/0095/07** (decided under the predecessor to the 2013 ET rules), who concluded it followed that "a tribunal has a greater leeway when considering whether or not to order a deposit" than when deciding whether or not to strike out and it was not wrong for a tribunal to make a provisional assessment of the credibility of a party's case when deciding whether to make a deposit order.

Conclusions

56. The reasons for not granting a deposit were as follows.

57. First, the respondent admitted in the response that the claimant had made a number of disclosures capable of being qualifying disclosures in the ET3, notably the disclosures at PD 1 and PD 5 (see para 34 amended GOR).

58. Second, those disclosures were of a nature and character which raised potentially significant issues. There appeared to be a basis for a number of concerns arising about safety matters within the respondent and there was information to suggest the claimant may be able to show he had a genuine belief that the guidance/practices in the workplace were not perhaps as robust as he had expected. The claimant appeared to have an arguable case that he had disclosed information tending to show a likely breach of a legal obligation or the requisite health and safety concerns under s43 B ERA 1996. The alleged concerns disclosed included perceived issues regarding the degree of unfettered access to emergency doors on a plane; the level of seniority of staff deployed on planes (at one stage it is alleged that all cabin staff were relatively new and on probation), the practices regarding serving of hot drinks, the practices regarding dimming of cabin lights during boarding or in the back galley during take off or landing. The claimant alleges that he was told he was "not the moral compass for the company" and should "mind his own business" in a meeting with occupational health on 5 March 2018, which, if he establishes such comments or similar comments were made, might suggest his safety disclosures were not entirely appreciated by everyone within the business or that his disclosures had been a wider topic of discussion amongst staff.

59. Third, it appeared that the main events related to and/or flowed from the fact that the claimant had his probation period extended. There was potentially cogent evidence that just before this extension the claimant had been informed there had been no issues identified with his performance and he was allegedly informed by a supervisor that "if you don't run naked in terminal 5 before 24 January everything would be fine" There was no cogent explanation before me as to why there was such a change of heart within the respondent regarding the claimant's future employment, allegedly just days after. The contention raised by the respondent was that the position all changed quickly simply because the claimant had, it was felt, potentially breached health and safety duties in respect of the seating of a child. From what I could glean, and on a provisional basis only, this appeared to be a potentially weak and curious explanation, in circumstances where the facts did not appear to cogently support the charges against him or the supposed seriousness of this issue. The claimant alleged that the mother of the child had apparently been informed to act in the way she had regarding by ground staff. This explanation was, it seems, rejected without any cogent explanation I could see. If it is the case that ground staff considered this to be the right course of action, it was not clear to me why the claimant had been considered to have made a serious error by acting as directed. There was also potential evidence that Mr Anderson had considered the issue a ground staff fault not one by the claimant. Further, it is contended by the claimant that a number of other staff had no knowledge of the supposed policy that he had "seriously" breached. The claimant made his concerns immediately known about this issue and "the doubtful reason" for extending probation. This allegation against the claimant did not appear to have much apparent force, at least from what I could see from my provisional review.

60. Fourth, the timing of his protected disclosures was shortly before the alleged retaliation and detrimental treatment. It was conceivable that there was a link in

view of the close time link between the comment confirming he was almost sure to pass probation and then the sudden move against him, at a time where he had been making further disclosures about safety. There was thus some potential evidence to support causation arguments.

61. Fifth, there was a rather troubling email sent by the Chief Executive of BA on11 March 2018, which stated as follows (in relation to an email from the claimant where, in essence, he had reiterated that his safety/working time and nationality concerns had not been properly dealt with in his view):

> *"of course the real question is what it is that we need to do in our screening process in order to detect people of this profile"*

62. The email that this email replied to set out a profile of a person who was concerned about alleged nationality related comments and health and safety compliance/other workplace issues. I could identify nothing in the claimant's email which could give a plausible reason for the CEO making such an apparently negative and sweeping comment about the claimant based on "his profile". Further, such comments could support the drawing of an inference by the Tribunal that senior management of the respondent had a negative approach to whistleblowers and/or to people of "his profile". The email appeared to suggest that persons of "this profile" should not pass the recruitment stage alone, let alone be retained following a probation period. I find it hard to see a cogent and neutral explanation for this comment. Only a few days later, the claimant resigned, claiming constructive dismissal. It is the case that the claimant was not aware of this email but it could have a probative effect in his case, depending on what it really meant and who saw the CEO's email and/or was aware of his email and/or made aware of the CEO's approach to matters of such a nature and why he took such apparently strident issue with the claimant's "profile" (and the related email).

63. As regards time issues, there is a preliminary issue as to whether the protected disclosure claim is in time. It will be necessary to identify when the last act complained of is and whether there was an act of extending over time to include the claimant's dismissal and/or detriment running to the last day of employment. This issue is quite fact sensitive and I did not feel it was possible to determine this on a preliminary basis.

64. If there was an act of extending over time to include the claimant's dismissal and/or detriment running to the last day of employment the protected disclosure claim would appear to be in time. If the claim fell outside the ordinary time limit in which it was reasonably practicable to claim, the Tribunal would need to determine whether the claim presented within such further period as the tribunal considers reasonable (s 48 (3) (b) ERA 1996).

65. I noted carefully the cases relied upon by the respondent (and the key quotes relied on in the helpful submissions) of **Palmer and Sanders 1984 ICR 372** and **Wall's Meat Co Ltd and Khan 1978 IRLR 44 as well as Cullinane UKEAT/0527/10 and Beasley UKEAT/0626/06/DM.**

66. The claimant's representative said he developed chronic anxiety as a result, he says, of the alleged treatment in this matter. I did not have the medical evidence in front of me but this appeared to present a potentially exceptional reason for any delay in filing his claim. See the Court of Appeal in **Schultz v Esso ICR 1202 CA**

and the EAT **in Williams EAT 0291/12** and **Imperial Tobacco v Wright EAT 0919/04**.

67. He also appeared to have a potentially genuine reason for being ignorant as to the time limits as the government guidance he relied upon was capable of being read in a number of ways. The guidance suggested that cases involving dismissal have a 3 month time limit from the last day and other cases have a time limit 3 months from the act complained of. It appeared to me that the claimant genuinely and not unreasonably believed that as his case involved dismissal this meant the 3 months from dismissal rule applied, not the other rule. It appeared the claimant was genuinely not aware that a detriment claim where there was a dismissal and a dismissal claim might each have different time limits. The explanation given by the claimant for this ignorance with regard to the extract from the government website he read, seemed potentially reasonable and credible. On top of the apparent anxiety condition, it appeared to me that this further potentially justified the claimant's approach. See **Wall's Meat Co Ltd and Khan 1978 IRLR 44.** I was not satisfied the time limit argument regarding the protected disclosure claims (both relating to detriment and dismissal) had little reasonable prospect of success

68. In all these circumstances, I was not satisfied the protected disclosure claims (both relating to detriment and dismissal) had little reasonable prospect of success. The respondent's application was therefore dismissed.

Public access to employment tribunal decisions

69. All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Employment Judge Daniels

Date: 22 January 2020

Sent to the parties on:

29/01/2020

For the Tribunal:

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