

Chronology is king; strike out in the EAT: *A v B* UKEATS/0042/19/SS(V)

By [Grace Nicholls](#)
3PB Barristers

Background

1. The parties in this case were referred to as **A** (for the Claimant) and **B** (for the Respondent). An Anonymity Order was in place to secure the protection of the parties' right to privacy. B is an NHS Trust. The matter also involved two witnesses **C/Dr X**, **SS** plus C's wife (**D**).
2. The Claimant is Indian and an observant Hindu. She was a doctor employed by the Respondent for 8 years. During the course of her employment, she had a sexual relationship with C/Dr X. There were descriptions of controlling behaviour by C/Dr X. Although C/Dr X was married to another woman (D), the Claimant considered herself married to him based on her religious beliefs about marriage.
3. After some time, the Claimant began to suspect C/Dr X was having a sexual relationship with SS, a junior doctor at the hospital. The Claimant was subsequently prosecuted and acquitted of assaulting SS. C/Dr X was investigated by the police in relation to a rape allegation, but no proceedings were instituted.
4. Disciplinary proceedings started against the Claimant, and she was dismissed on 17 August 2016.
5. This case summary deals only with the issue of strike out, and not with the substantive claims nor the Anonymity Orders made by the ET and EAT

The Law

6. Rule 37 of the Employment Tribunal Rules 2013 permits the Tribunal, at any stage of the proceedings to strike out all or part of any claim or response on any of the grounds set out within the rule.

7. The relevant subsections of Rule 37(1) are (b), (c) and (e), namely the manner in which proceedings have been conducted by or on behalf of the Claimant has been scandalous, unreasonable or vexatious (Rule 37(1)(b)), for non-compliance with the Rules or an order of the Tribunal (Rule 37(1)(c)) or that it is no longer possible to have a fair hearing in respect of the claim (Rule 37(1)(e)).

The Employment Tribunal

8. Before the Tribunal the Claimant pursued claims of unfair dismissal, sex and religious discrimination. The Claimant sought to raise a number of allegations outside of the Tribunal's jurisdiction such as sexual assault, fraud and manslaughter¹.
9. In October 2018, a second Preliminary Hearing took place before EJ Gall. A note was issued by the EJ stating that the Claimant's language in emails was "not appropriate", but no formal restrictions were placed on the Claimant's email correspondence.
10. The Respondent's first strike out application was made on 14 November 2018.
11. For completeness, the Respondent made 2 strike out applications; the first before EJ Hendry in December 2018 which was unsuccessful and the second before EJ Hosie which was successful in March 2019.
12. The basis for both applications for strike out centred on the Claimant's communications.

The First Strike Out Attempt: EJ Hendry

13. The communications before EJ Hendry, who refused the first application for strike out, included emails from the Claimant to SS, C/Dr X and others (including the Respondent's solicitors) in September 2017, in February 2018, September 2018 and November 2018 (found at para 12 of the EAT judgment). They made various references to bullying, harassment, stalking, assault, defamation, misuse of public money, attempted manslaughter and abuse of patients. The emails included allegations of sexual harassment directed towards the Respondent's solicitor².

¹ Para 9 EAT judgment

² Para 12 EAT judgment

14. EJ Hendry acknowledged in his judgment that the Claimant had intimidated SS but that since she was not an essential witness, the Judge did not consider that a great deal of weight could be attached to that factor. The EJ took evidence from the Respondent's solicitor on the communications that had occurred between him and the Claimant; the solicitor's evidence was that the correspondence was "wearisome and upsetting and that he had genuine concerns that [the Claimant] might act on her threat to protest outside his home".³

15. EJ Hendry said he was "not quite convinced" to strike out the claims but that a fair trial was in "considerable jeopardy"⁴. He said that the answer could lie in "robust case management". EJ Hendry further said that "the Claimant's behaviour...has been quite extraordinary" and that in his lengthy experience as an employment judge he had "experienced nothing like this"⁵.

16. Case Management orders were made by EJ Hendry as follows:

(1) The claimant shall immediately desist from repeating the allegations previously made by her in email correspondence against SS, Dr X and Mr Gunn, whether in future correspondence or otherwise, except where it is necessary and relevant to advance the issues in her claims for unfair dismissal and discrimination and she had beforehand obtained the express permission of the Tribunal to do so.

(2) The claimant shall correspond professionally and politely with Mr Gunn or any other representative of the respondents.

(3) The claimant shall not except with the sanction of the Tribunal contact or attempt to contact any witnesses until a Witness List is agreed.

17. The Respondent made a second strike out application and relied on the following emails: to C/Dr X on 12 January 2019, an email of 13 January 2019, 28 January 2019, 30 January 2019 and 8 February 2019 (please see paras 21-23 of the EAT judgment).

³ Para 16 EAT judgment

⁴ Para 17 EAT judgment

⁵ Para 18 EAT judgment

18. The Claimant did not receive the CMO made by EJ Hendry until 23 January 2019 (although it was registered on 7 December 2018) and was therefore not aware of its terms and orders before then.

The Second Strike Out Attempt: EJ Hosie

19. On 5 March 2019 the Claimant's claim was struck out. EJ Hosie's reasons for striking out the claims were, essentially, that the Claimant had ignored the warnings given in respect of her conduct, had intimidated C/Dr X and had breached Tribunal orders.

The EAT

20. Before Lord Summers, the Claimant appealed the order made to strike out her claim.
21. Lord Summers noted that EJ Hosie knew that the Claimant did not receive the Judgment of EJ Hendry until 23 January 2019 yet considered the emails sent by the Claimant of 12 and 13 January 2019 and concluded that they were "sent in defiance of EJ Hendry's warnings".
22. Counsel for the Respondent sought to argue that EJ Hosie had been referring to informal warnings given to the Claimant by the Judges who conducted previous hearings. The EAT did not agree with this submission given the wording of EJ Hosie's judgment which made specific reference to EJ Hendry's warnings to desist and moderate her conduct.
23. Lord Summers held that:

*"in any event I consider that if strike out is to be based on a party's failure to heed warnings, it is desirable that the warnings should be in clear and unmistakable terms. It is desirable that a party should appreciate the potential consequences of his or her actions. Since formal warnings only appear in the First Judgment, I consider that EJ Hosie would not have been entitled to rely on other warnings. Since the emails of 12 and 13 January 2019 were written before she received the First Judgement it could not be said that the Claimant had ignored EJ Hendry's warnings. To ignore the warnings, she would have had to have received and read the First Judgment."*⁶

⁶ Para 41 EAT judgment

24. Lord Summers concluded that EJ Hosie should not have regarded the emails of 12 and 13 January as contraventions of rule 37(1)(b) or (e).
25. However, Lord Summers went on to conclude that strike out was nevertheless appropriate given the emails sent by the Claimant after receipt of EJ Hendry's judgment from 28 January 2019, 30 January 2019 to 8 February 2019.
26. The EAT held that those emails breached the orders requiring the Claimant to refrain from repeating allegations which the Tribunal considered scandalous, unreasonable and vexatious, and to communicate politely with the Respondent's representative.
27. Lord Summers gave the following concluding remarks:

"I consider that the Tribunal having regard to the Claimant's conduct could have no confidence that she would act with appropriate restraint in further correspondence with parties or with the Tribunal or in her conduct at any hearing of evidence. [The Claimant's representative at the appeal hearing] conducted the appeal on the Claimant's behalf with appropriate restraint. But there was no assurance that he would continue to act for the Claimant nor that she would control her email communications in future."

28. The appeal against strike out was therefore refused.

Comment

29. The outcome in this case is somewhat unsurprising given content of the email communications and the disobedience of the Claimant to EJ Hendry's case management order following the first strike out application and receipt of the CMO.
30. Whilst every strike out application is naturally very fact sensitive; this case is an important reminder to practitioners to ensure that when applications for strike out are made, the basis for seeking such a draconian order under rule 37 is made clearly and that, in as far as possible, the chronology of events are set out in the clearest possible terms.

1 July 2021

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Grace Nicholls

Barrister
3PB Barristers

0330 332 2633
grace.nicholls@3pb.co.uk

3pb.co.uk