Neutral Citation Number: [2013] EWHC 4118 (QB)

Case No: HQ12D05474

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2013

Before :

SIR DAVID EADY
Sitting as a Judge of the High Court

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Between :

AYODELE ADELE VAUGHAN — **Claimant**

- and -

(1) LONDON BOROUGH OF LEWISHAM
(2) RALPH WILKINSON
(3) CHRISTINE GRICE
(4) ELAINE SMITH
(5) VALERIE GONSALVES
(6) ELAINE HATTAM
(7) KATE PARSLEY — **Defendants**

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The Claimant in person
William Bennett (instructed by **Legal Services, London Borough of Lewisham**) for the **Defendants**

Hearing dates: 28 and 29 November 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR DAVID EADY

Sir David Eady :

The applications before the court

1. Over 28 and 29 November 2013, I heard applications by the Defendants to strike out this action, which is primarily a claim for libel, as an abuse of process and/or for summary judgment on the issues of qualified privilege and malice. I also heard an application by the Claimant, acting in person, to strike out the defences in their entirety. An application by the Defendants for an extended civil restraint order was to have been advanced in the event of their strike-out succeeding but, in the course of the hearing on 28 November, Mr Bennett indicated that it was not going to be pursued, for the time being at least, in the light of assurances given by the Claimant during her submissions, to the effect that she had no intention of launching any further claims arising out of the same subject-matter; that is to say, the circumstances leading up to dismissal from her employment by the First Defendant ("the London Borough") on 13 April 2012. (She had been suspended originally on 10 August 2011.) Furthermore, at the conclusion of the hearing, she also made clear, although she alleges that some or all members of the Defendants' legal team should be regarded as being in contempt of court, by reason of their conduct of the case in certain respects, that she has no intention of launching contempt proceedings herself. She was simply registering her complaints in this regard, with a view to the court drawing the matter to the attention of the Attorney-General if it was thought appropriate.

The background to the dispute

2. Before turning to the substantive issues before me, it is necessary to set out a brief history of the background which has led to the present applications. It can conveniently be taken from the evidence of Mr Milivojevic, a solicitor employed by the London Borough. This was contained in a witness statement dated 13 November. He explained that the Claimant had been an employee of the London Borough, with effect from 1 April 2011, and that the personal Defendants in these proceedings were also employees during the same period. Her employment had effectively been transferred to the London Borough from Careers Enterprise Ltd ("CEL"), which was a subsidiary of Babcock Education and Skills Ltd ("Babcock") in accordance with the Transfer of Undertakings (Protection of Employment) Regulations (2006/246). Thus she came to be treated, thereafter, as though she had been employed by the London Borough during that earlier period.

3. Prior to 1 April 2011, she had commenced three claims in the London South Employment Tribunal ("ET") against CEL, Babcock and some individuals employed by them. They were based upon allegations of race discrimination, harassment, victimisation and "public interest disclosure detriment". In due course, the London Borough became a defendant to those pre-existing claims by reason of the 2006 Regulations and, thenceforth, became responsible for the costs of defending them (which amounted in the event to some £260,000). They were eventually dismissed on 2 March 2012, following a long hearing which had commenced on 9 January and concluded on 1 March 2012. (There were 20 days of formal sitting and more than another five days in deliberation.) On 23 April 2012 the Claimant was ordered to pay one third of the Defendants' costs. The ET concluded that the Claimant's pursuit of "an allegation of mass conspiracy with no evidence to substantiate it" had been unreasonable. Indeed, the claims were said to have been "misconceived from the

outset". An appeal to the Employment Appeal Tribunal on the costs order was dismissed on 6 June 2013.

4. It had become necessary to go through the further expensive process of a detailed assessment. After a two day hearing over 18 and 19 March 2013, the assessment was adjourned for a further four day hearing to take place in November. In the meantime, however, on 13 August 2013 the Claimant was declared bankrupt following the issue of a bankruptcy notice by Babcock in respect of a different set of ET costs (relating to a ninth claim). After that had been issued, she finally agreed with the London Borough to quantify the outstanding costs order in its favour, in respect of the first three claims, at £69,000 (including VAT and interest). None of this debt has been paid.

5. Meanwhile, on 9 August 2011, the Claimant had commenced a fourth set of ET proceedings against the London Borough (by this time her employer), Babcock, CEL and Marina Waters (a nurse who had been engaged by the London Borough to carry out an occupational health assessment of the Claimant). The claim against Ms Waters was struck out on 19 April 2012. The Claimant withdrew parts of her claim against Babcock and CEL, which were accordingly dismissed. In March 2013, the remainder of the fourth ET claim was withdrawn (together with all other outstanding ET claims) in circumstances which I shall shortly recount. Thereafter, it has been her wish to pursue her complaints through the medium of these High Court proceedings, which had been launched by claim form dated 19 December 2012.

6. The background narrative does not end there, however, since there were by this time no less than five other sets of ET proceedings which had been brought by the Claimant (her the fifth to ninth claims). The fifth to eighth claims concerned incidents alleged to have taken place after she transferred to the London Borough. It was, therefore, itself a Defendant but alongside a number of its other employees. The Defendants to the present High Court proceedings have all been made parties to ET proceedings except for Kate Parsley (the Seventh Defendant). This came about because an internal enquiry had been carried out following the Claimant's suspension on 10 August 2011, in order to see whether it was appropriate for her employment to be continued or whether, on the other hand, she should be dismissed. That hearing took place during February and March 2012.

7. The decision to dismiss her was taken against the statutory background of the Employment Rights Act 1996. This provides for five grounds on which a dismissal may fairly be made. The only one relevant for present purposes is known as "some other substantial reason". It is on that account that the internal enquiry has been referred to throughout as the SOSR hearing. As had been explained in a letter of 5 April 2012, the "substantial reason" relied upon by the London Borough here was that there had been a breakdown in the working relations between the Claimant and her colleagues.

8. In the fifth to eighth claims, the Claimant was alleging that she had not been treated properly during that hearing and that, accordingly, her dismissal thereafter should be held to have been unfair. That complaint lies at the heart of her claims for defamation also, since she relies upon many of the statements that were made, both orally and in writing, in the course of the SOSR hearing. It thus immediately becomes apparent that there is, to say the least, a very substantial overlap in the underlying subject-matter of

the current proceedings with that of the fifth to eighth ET claims. Indeed, the Claimant herself in an email of 23 February 2013 described the High Court proceedings as "arising from the same facts" with a view, at that stage, to persuading the ET to stay her pre-existing claims in that jurisdiction while she pursued her libel remedies.

9. Finally, to conclude the narrative, I need to mention the ninth ET claim. This was launched on 5 November 2012 against not only the London Borough but also Babcock and Babcock Careers Guidance Ltd. Remedies were sought against those companies in respect of alleged victimisation on grounds of race and disability although, rather curiously, arising out of incidents occurring after she had transferred to the London Borough. Accordingly, those claims were struck out on 21 March 2013 and the Claimant was ordered to make a contribution of £2,000 towards their costs (which, I was told, actually totalled £8,381). Again, the claims were held to have been "misconceived" (the detail matters not in the present context). As to the London Borough, the ET stated its intention to call upon the Claimant to show cause why that part of the claim should be allowed to continue. Shortly thereafter, however, on 26 March, she discontinued all outstanding ET claims.

The subject-matter of the High Court claim

10. The nature of the High Court proceedings, now before me, emerges from the re-amended particulars of claim, which are dated 31 July 2013 and run to some 42 pages. (The original particulars of claim had been served in February 2013, and were amended pursuant to an order of Master Leslie.) The Claimant's complaints relate to a multiplicity of statements made in the course of the SOSR hearing, which are said to be defamatory. Mr Bennett emphasises, however, the technical nature of the relevant publications. At the hearing, in February and March 2012, publication is relied upon to the two professional note-takers employed to make a record of the proceedings. They were Susan Funnell, who attended on 27 and 28 February and 6 March, and Jocelyn Heyford, who was present only on 22 March. It is accepted that the script of the Third Defendant's opening statement was handed out on 27 February and thus published to Ms Funnell. For present purposes, it is probably appropriate that I should assume its publication also to Ms Heyford. Obviously, the oral statements made by the individual Defendants would have been published to whichever of the note-takers happened to be on duty at the relevant times.

11. A bundle of over three hundred pages had been prepared for the hearing and was sent in advance of it to Unison, the Claimant's trade union, because she had indicated that Unison would be representing her at the hearing. It was only after the bundle had been sent that she notified the London Borough that she would be acting for herself and without the assistance of Unison. There is no evidence that anyone troubled to read the bundle at Unison: there was no need in the event for anyone to have done so, and the staff would no doubt have had many other pressing duties at the time.

12. There is thus no reason to suppose that the Claimant's reputation was significantly affected in the eyes of Unison staff. Similarly, the two note-takers would only have been concerned to record the allegations made, and would have no particular interest in weighing the merits or forming a view as to the Claimant's behaviour or character. The very limited scope of publication is naturally relied upon by Mr Bennett in submitting that the Claimant is unable to demonstrate any "real and substantial tort".

He argues that the continuation to trial of the High Court proceedings is unlikely to yield any tangible advantage to the Claimant, with respect either to damages or possible vindication, such as to justify the considerable expenditure that would be incurred by the London Borough, in defending them, and by the wider public in terms of court resources. One cannot ignore, either, the continuing stress inherent in the process so far as the individual Defendants are concerned, which would be additional to that already incurred in relation to the ET proceedings in which they were involved and also more prolonged.

13. What is more, it is said that the publication of the bundle to Unison took place with her consent in any event. The Claimant argues that she would not have consented to the publication of any defamatory material, but the reality is that at the material time she wanted Unison to represent her at a hearing at which (she knew) the London Borough and its employees would inevitably be airing a good many allegations of conduct on her part, in the light of which they would be suggesting that her suspension and dismissal were appropriate. She would thus be consenting, at least impliedly, to the publication of whatever documents, containing whatever allegations, it would be necessary for Unison to consider for the purpose of representing her interests adequately at the imminent SOSR hearing.

14. Other issues raised by way of defence include qualified privilege, in relation both to the publications to the note-takers and to the sending of the bundle to Unison: the Claimant responds by alleging malice. This is on the basis that the relevant individuals, responsible for the communications, knew that some or all of the statements about her were false. To resolve the issue of malice, therefore, would involve a long and detailed enquiry into what happened during the relevant period and who knew what at particular times. Given the history to which I have referred, it is reasonable to suppose that this would take several weeks.

The events of February to April 2013

15. By February of 2013, the ET claims were well advanced. A timetable for their disposal had been laid down on 16 October 2012, with a view to their being resolved between 23 September and 1 November 2013. But the Claimant seems to have been dissatisfied with the way things had progressed in certain respects, quite apart from the fact that her first three claims had by that time been rejected. One of the areas of concern was that on 2 August 2012 Judge Balogun had refused her application to admit in evidence no less than 39 hours of covert recordings she had made, including of the SOSR hearings themselves (which she would also wish to put in evidence in the High Court). Because of the overlap with the issues raised in the High Court litigation, there seems to have then come about a degree of tactical manoeuvring.

16. On 12 February, she applied to the ET to reconsider the ruling on covert recordings (with a view to it being dealt with at a pre-hearing review on 21 March). She stated that she needed these in order to enable her to demonstrate that her dismissal had been based on "a body of lies and the Respondents' fabricated/falsified documentary evidence given by the Respondents during the SOSR procedure". This allegation corresponds to and reflects her pleaded case on malice in the libel claim.

17. Thereafter, she adopted a fresh tactic by applying, in the email of 23 February to which I have already referred, for the outstanding ET claims to be stayed while she

progressed the High Court action. In order to support this argument, it became useful to her to place emphasis on the degree of overlap between the issues arising.

18. At the pre-hearing review, on 21 March, Judge Balogun varied the earlier ruling so as to admit five hours (only) of the covert recordings. She also struck out, as I have said, the ninth claim so far as the Babcock companies were concerned, and called upon the Claimant to show cause vis-à-vis the London Borough. Further, she made the order for a contribution towards costs. She did not grant a stay. In response to these adverse rulings, the Claimant applied on the following Monday for a High Court injunction before Sharp J (as she then was) "to prevent harassment by defamatory publications" being made about her in the ET trial. This was obviously hopeless for the reasons fully explained by the Judge: [2013] EWHC 795 (QB), at [17]-[37]. At the same hearing, the First to Seventh Defendants applied for the High Court defamation proceedings to be stayed to abide the outcome of the ET claims. This was again because of the overlap in issues. On the day of the hearing, 25 March, Sharp J gave brief reasons for acceding to the stay application and indicated that a fuller judgment would be handed down in due course (as happened on 11 April). Without waiting for the judgment, however, the Claimant adopted a new tactic. On 26 March, she notified Judge Balogun by email that she would pursue the ET claims no further. It seems clear, therefore, that she now wished to place all her eggs in the High Court basket, perhaps because she had no faith in Judge Balogun. Be that as it may, it is now necessary to consider carefully the reasons contained in the judgment of Sharp J for granting the stay.

The judgment of Sharp J

19. As the Judge explained, at [38]:

> "… Both the ET proceedings and the Claimant's claim in defamation/harassment centre exclusively on the same circumstances relating to [her] treatment as an employee."

20. In the light of that central point, she went on to identify the grounds for granting a stay. As she pointed out, at [40], there is an obvious public interest in avoiding a multiplicity of claims, for reasons of cost, delay, and fairness to any party who would be forced to deal with what is effectively the same claim more than once. She went on to consider what was just and convenient on the facts before her. She concluded that there were cogent considerations in favour of the ET proceedings being dealt with first, whereas there were none of any weight pointing the other way.

21. She noted that the ET was first seised of the matter and was the obviously the appropriate jurisdiction for the resolution of claims relating to employment, loss of earnings and damages for discrimination. Such tribunals had been established by the legislature to determine such disputes with the minimum delay. Here, the ET proceedings were well advanced by that stage and, moreover, a great deal of time and public resources had already been dedicated to them. If the fixture were to be lost (as would seem likely if the High Court action were not stayed), then there would be undesirable delay and wasted costs. The Judge added, at [41], that it was "not irrelevant" that the Defendants stood no realistic prospect of recovering any costs from the Claimant in view of her lack of funds.

22. A further consideration was that the ET proceedings not only extended more widely but also included a claim for discrimination, which could only be resolved in that jurisdiction. It is, of course, true that one of the main objectives of a claim for libel is to obtain vindication in respect of any damage to reputation (now regarded as falling within the scope of Article 8 of the ECHR). Yet, as Sharp J also pointed out, at [43], "… the ET proceedings provide the Claimant with a means (and it may well be the best means, given the issues which are at stake) of obtaining vindication in respect of the matters about which she complains in both sets of proceedings". I would not accept that this reasoning is in any way undermined by the inclusion of claims resorting to Article 8 of the ECHR or to the principles of data protection.

23. It appears that the Claimant had argued before Sharp J that one reason why the defamation claim should be determined first was that she would have available the covert recordings excluded by the ET. She was not entitled, of course, to assume that any or all of those recordings would be admissible in the libel claim. The matter had not yet been argued or determined. As the Judge noted at [45], the High Court might well confine the use of those recordings "for reasons of relevance, cost and the proportionate conduct of the litigation". In any event, at [44], she made the following important observation:

> "That the Claimant may have brought a second set of proceedings essentially covering the same ground as those brought in the ET, to avoid or circumvent the effect of a ruling she does not like in the ET is in my judgment a factor in favour of staying the second set of proceedings and not militating against that result."

24. Sharp J contemplated, at [43], the possibility that it would be open to the Claimant, after the ET proceedings were concluded, to apply for the stay of this action to be lifted, but any such application would have to be determined on its merits (as they appeared at the material time). There would obviously not be any right to have the stay automatically lifted. It would be appropriate on any such application for the court to consider whether, having regard to the outcome of the ET claims, there would remain any tangible or legitimate advantage to the Claimant such as to justify her in then pursuing the High Court action; or, as it is sometimes put, whether the game would then be worth the candle: see e.g. *Dow Jones & Co Inc v Jameel* [2005] QB 946 and *Cammish v Hughes* [2012] EWCA Civ 1655.

The circumstances now before the court

25. Sharp J was aware by 11 April that, following the earlier announcement of her decision to stay the libel action, the Claimant had decided to abandon the outstanding ET claims rather than have them determined at the forthcoming trial: see at [45]. Later, in May 2013, she also obtained an order lifting the stay imposed by Sharp J. Neither of these steps, however, can be taken as affording her a *right* now to proceed with the libel action. It is not as though she had been put to her election, and then opted to pursue this High Court action. Whether she may proceed must be determined in the light of the circumstances now prevailing. In addressing the merits of Mr Bennett's applications, I need to take account of similar considerations of public policy to those addressed by Sharp J and summarised above, at [20]-[23]. They have not ceased to be relevant merely because of a tactical decision taken by the

Claimant. It is true that the circumstances have materially changed since Sharp J reached her original conclusion, since it is no longer open to the Claimant to obtain the remedies potentially available to her in the ET (including the form of vindication canvassed by Sharp J: see [22] above). But that was by her unilateral choice.

26. She does not have an unqualified right now to proceed to trial in the High Court, whether by reason of Article 6 of the ECHR or otherwise. Her rights are subject to taking proper account of the overriding objective, and the need for economy and proportionality. The situation is in some respects analogous to that which arose in *Schellenberg v BBC* [2000] EMLR 296. There were parallel libel claims, all in the High Court, each of which offered the Claimant the opportunity of resolving the same or very similar issues and of achieving the vindication he was seeking. He chose to settle those brought against *The Guardian* and *The Sunday Times*, on disadvantageous terms which did not achieve that objective, several weeks into the trial. He then wished to press on with a claim against the BBC which turned upon very similar issues, but which had not even reached the trial stage. He was not permitted to take that course, despite arguing that he had a constitutional right to trial by jury, not least because he should have availed himself of the opportunity of resolving all the relevant disputes in the other claims while he had that chance. That approach would appear to be compatible with later appellate decisions, such as *Wallis v Valentine* [2003] EMLR 8, at [32]-[33] and *Dow Jones & Co v Jameel*, cited above.

The case on abuse of process

27. In developing his submissions on abuse of process, Mr Bennett took me to first principles and cited the words of Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, where he referred to the court's duty to prevent the misuse of procedure in a way which would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute.

28. Here, it is said, a fair minded onlooker would surely think the worse of a procedural system which enabled a litigant to cast aside one set of proceedings, in which the court has held that she may be able to obtain all necessary or proportionate redress, and on which thousands of pounds has already been spent by the other party, simply because she thinks it gives her a tactical advantage in some respect, or may offer some marginally different form of remedy. Both fairness to the Defendants in this case, and the more general requirements of proportionality, would seem to oblige the Claimant to avail herself of the opportunities in the ET proceedings first, as Sharp J contemplated, and before compelling the Defendants to incur the very substantial and additional cost of resolving this High Court litigation. Mr Bennett cited a well known passage from the speech of Lord Bingham in *Johnson v Gore-Wood & Co* [2002] AC 1, at 31, where he referred to the public interest that there should be finality in litigation and that a party should not be twice vexed in the same manner. He added that the public interest was reinforced by the current emphasis on efficiency and economy in the conduct of litigation. See also more recently *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

My conclusions on abuse of process

29. It surely cannot be right that this (or any other) litigant can decide for herself that such large sums of public money already spent should simply be written off and the

Defendants required, from now on, to commit even more to the current proceedings. If this were permitted, the court would be abdicating its duty of case management and abandoning the interests of one party to the untutored whims of the other. That would be quite contrary to the principles underlying the CPR and, in particular, inconsistent with the overriding objective. The Claimant's decision, taken immediately after Sharp J announced her decision on 25 March 2013, and without even waiting to listen to her full reasons, can only be characterised as tactical and precipitate. When the reasoning behind the decision was fully set out on 11 April, it became clear (if it was not already) exactly why the ET proceedings should have been allowed to run their course. But, in acting as she did, the Claimant appeared determined to pre-empt the court's judgment and to decide the far-reaching case management issues solely by reference to what she perceived to be her own interests. (Mr Bennett used the expression "playing the system".) That is unacceptable. To allow this to happen would certainly "bring the administration of justice into disrepute". On this ground, I am satisfied that the claim should now be struck out because its continuance in these circumstances would be an abuse.

30. One of the Claimant's arguments was founded upon delay. She said that these points should have been taken, if at all, at the time when the court was asked to lift the stay (in May). It may well have been more convenient in certain respects, but it does not seem unreasonable to have waited until the Claimant had taken the opportunity, with leave of the Master, to re-amend her statement of case so as to present her claims in the best light she could. It would then be possible to make a more informed decision as to whether these proceedings should be permitted to continue as being "worth the candle". As I have said, the re-amendment took place on 31 July.

31. The other, closely related, argument on abuse was to the effect that the Claimant cannot demonstrate a "real and substantial tort" by reason of the limited publications relied upon. Rather as in the case of *Khader v Aziz* [2010] EWCA Civ 716, at [32], it may be said here that the Claimant, if she overcame all the hurdles raised by the defence, "would at best recover minimal damages at huge expense". Once again, therefore, the game would not have been worth the candle. In so far as there was any vindication required in respect of the two note-takers, or the sending of the pre-hearing bundle to Unison, it could have been achieved much earlier, for the reasons given by Sharp J, by means of the ET proceedings. It was neither necessary nor proportionate to press ahead, come what may, for the purpose of her achieving either compensation or vindication. I would uphold the abuse application on this second ground also.

The alternative case on qualified privilege and malice

32. Were it necessary to do so, I would have ruled that the occasions of publication pleaded, in respect of the note-takers and the Unison bundle, were both within the scope of qualified privilege. The preparations for and the conduct of the SOSR hearing would present a classic case of qualified privilege and the publications to the note-takers were incidental to that overall purpose. For so long as the Claimant was expressing the intention to be represented by Unison for the purposes of the hearing, it was appropriate for the London Borough to keep the Union informed of what was going on, and being alleged, in relation to its member. The supply of the bundle would thus also be the subject of qualified privilege.

33. As I indicated to Mr Bennett during the course of argument, however, it would hardly be possible to rule in relation to the pleaded case in malice that it is bound to fail. One cannot see merely from the papers that the allegations, even if made out at trial, would necessarily fail to establish the relevant states of mind: cf *Seray-Wurie v Charity Commission of England & Wales* [2008] EWHC 870 (QB). It would be necessary to go into the history in order to see what happened and who knew what. Otherwise, no conclusion could be reached on whether the allegations in question were known to be false at the time of publication.

The Claimant's application to strike out the defence

34. As to the Claimant's wholesale attack on the defence, Mr Bennett dealt with the matter peremptorily at the close of his submissions. He made the point that, for all the industry underlying the presentation of this application, it is simply impossible to expect the court to conduct a mini-trial and decide that the pleaded case was lacking in merit. The outcome must depend on resolving conflicting evidence in the course of a trial.

The Claimant's argument on contempt of court

35. I conclude by saying that I see no reason to refer the conduct of the Defendants' legal advisers to the Attorney-General on the basis of any of the material I have seen so far. They are simply putting forward on behalf of their clients a case with which the Claimant profoundly disagrees and factual allegations which she says are false (and known by some of the Defendants, at least, to be false). That is an everyday occurrence in civil litigation.

The overall outcome

36. For these reasons, I will strike out the claim and dismiss the Claimant's application.