Case Number: 1301151/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Herry**

Respondent: **Dudley Metropolitan Borough Council**

Heard at: Birmingham **On: 11 and 25 September 2017**

Reserved decision: 27 September 2017

Before: **Employment Judge Hindmarch**

Representation

Claimant: In person
Respondent: Ms George, Counsel

RESERVED JUDGMENT

The Respondent's applications for strike out and deposit are refused.

REASONS

Background and issues

1. The application before me was the Respondent's application for a strike out of the Claimant's claim or as an alternative a Deposit Order. The application came before me on 11 September but went part heard. Submissions were taken on 25 September and Judgment was Reserved. I reached my decision on 27 September 2017.
2. The Claimant is a litigant in person and represented himself. The Respondent was represented by counsel Ms George.
3. In advance of the hearing, on 29 August 2017, the Claimant sent an email to the Employment Tribunal requesting that he be permitted to use a Dictaphone during the hearing. His email asserted that he was a litigant in person with a recognised disability of dyslexia of which the (Court) had previously been made aware and that the (Court) had previously allowed him to record proceedings.

In a letter to the Employment Tribunal of the same date the Respondent did not object to the Claimant's application. Employment Judge Broughton as confirmed in a letter from the Tribunal to the parties dated 6 September 2017 indicated that the issue of whether to allow the proceedings to be recorded would be determined by the Employment Judge at this Preliminary Hearing.

4. At the outset of the hearing I dealt with the application. The Claimant told me he has dyslexia and has difficulties in taking notes and listening at the same time. The Respondent did not object. I acknowledged that the Tribunal would consider any reasonable adjustments required and explored with the Claimant whether any adjustments other than recording the hearing might assist him such as giving him extra time to take notes and/or regular breaks. The Claimant informed me this would take too much time and given the Respondent had a note taker present (to which I presumed he was referring to the Respondent's counsel having her instructing solicitor present) he wanted to be on an equal footing.

5. I therefore agreed that the Claimant could use his own recording device but indicated that in such circumstances the Tribunal should also make a recording. We therefore re-located to a Tribunal room with recording facilities. We used the same room and recording facilities on 25 September 2017.

6. By way of documentation the proceedings were somewhat hampered by a large volume of documents and different bundles being referred to by the parties. The Respondent brought a large lever arch bundle running to some 500 pages. It transpired the Respondent had made photocopying errors with its first bundle which was prepared. On realising this the Respondent sent another bundle to the Claimant which was handed to me at the hearing and which I refer to as R bundle 1. The Claimant appeared not to have received this. The Claimant was therefore working at times from the first bundle sent to him by the Respondent which was not before me.

7. In addition shortly before the hearing the Claimant had emailed to the Tribunal and the Respondent documents he wanted to see in the bundle. The Respondent's counsel had put these documents into a smaller bundle and had also added Judgments from other proceedings between the parties which she wished to rely on in her application before me. That bundle I call R bundle 2.

8. The Claimant then brought to the hearing an additional bundle which I call C bundle 1. The Respondent had not been given a copy of that bundle although it appeared to have many documents within it which were in the Respondent's bundles.

9. The Claimant had produced a witness statement. It had gaps where the page references should appear. We agreed the Claimant would give his evidence first and would take us to the relevant pages so his evidence could be properly understood. I agreed Ms George would be given any time she required to consider and take instructions on any documents the Claimant referred to which had not been previously seen by her or her client.

10. During his evidence the Claimant also referred to additional documents, letters from the Respondent to the Claimant after issue of proceedings and correspondence from the Information Commissioner's Office. I permitted the Claimant to refer to these albeit they did not appear relevant to the application before me. I also record that on 26 September 2017, the day after submissions

were made and concluded, the Claimant emailed additional documents to the Tribunal. These appear to be copies of the documents referred to earlier in this paragraph.

11. On 25 January 2017 both parties appeared before me for the purposes of submissions. The Claimant brought with him a new bundle which I shall call C bundle 2. The Respondent also brought additional documents being further extracts from earlier Judgments in other proceedings between the parties.

12. Both parties handed up skeleton arguments on 11 September. On 25 September the Claimant handed up a revised skeleton argument.

13. In between 11 and 25 September the Claimant made an application by email to the Employment Tribunal on 21 September 2017 both to amend his claim and to adduce without prejudice communications. I made it clear when we reconvened on 25 September that I was not dealing with those applications. I was dealing only with the Respondent's application to strike out or make a Deposit Order in respect of the claims as set out in the ET1 dated 3 April 2017. Having made this clear the Claimant still referred to without communications in both his evidence before me on 11 September and in his submissions on 25 September. The Respondent objected to this. For the reasons given herein I did not find it necessary to consider such evidence.

14. On 11 September 2017 as already stated the Claimant gave evidence and was cross-examined by Ms George. The Respondent tendered a witness statement of a Pauline Dean who was not present on either date. Ms George explained on 11 September that Ms Dean was on holiday and would therefore not be attending. The Claimant expressed concern about the Respondent relying on her witness statement in the circumstances. I explained to the Claimant that I would give it less weight than I would do had Miss Dean presented herself to be cross-examined by him and be asked questions by myself.

15. The Respondent's application for strike out or deposit was set out in its letter to the Tribunal dated 4 July 2017. That letter referred to previous proceedings between the parties. I explained at the outset of this hearing on 11 September that I had no prior knowledge of these claims other than what I had read in the application. Nevertheless I became aware of more details regarding the previous proceedings as the application progressed not least because both parties referred to them and referred me to previous Judgments.

16. This is the Claimant's fifth set of proceedings in this Tribunal concerning the Respondent. The Claimant had two roles with the Respondent. He remains employed by the Respondent as a youth worker and these proceedings are the first he brings in respect of that role. He was also previously employed by the Respondent as a teacher. However he was dismissed from that role in 2015. His other claims all concern that teaching role.

17. The claim before me was issued on 3 April 2017. The Claimant is claiming disability discrimination, victimisation and harassment. The particulars given in the ET1 do not flow easily with one page not seeming to flow seamlessly to the next. The Respondent put to the Claimant in cross-examination that the particulars appeared to resemble every other page of his grievance raised with the Respondent on 14 November 2016 and at pages 364 to 376 of R bundle 1, and his appeal against the grievance decision undated but at pages 404 to 414 of R bundle 1. The Claimant appeared reluctant to agree that this was the case

but the particulars in Rider 8.2 of the ET1 do appear remarkably the same as the grievance and grievance appeal.

18. The Claimant is a litigant in person and I therefore make some allowance for him in terms of his pleadings. However he has not identified his allegations in a particularly coherent way nor spelled out the legal heads of claim. Nevertheless, and I am grateful to her, Ms George agreed in her submissions that she could make out some 19 allegations that fall into four broad subsets as follows:-

    a. Disciplinary proceedings relating to a covert recording of the meeting on 5 September 2016;

    b. Warnings given under the Absence Management Policy;

    c. Miscellaneous complaints of acts of day to day management;

    d. The dismissal of his grievance by Mr Stringfellow

19. I understand that at least in relation to the first set of proceedings between the parties (Case Number 1317426/12) the Respondent accepts the claim was a protected act for the purposes of section 27 Equality Act 2010. It follows that the matters pleaded in this claim could be put as acts of victimisation. The Claimant has indicated he is bringing a complaint of victimisation. It is unclear to me whether they are being separately pleaded as distinct acts of discrimination and/or harassment and the Claimant will need to better particularise these matters in due course.

The law and submissions

20. The Respondent's application to strike out or for a Deposit Order was made as said earlier in its letter to the Tribunal of 4 July 2017.

21. The Respondent relies on Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 which provides as follows:

    "(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

    (a) that it is scandalous or vexatious or has no reasonable prospect of success."

22. In relation to the Deposit Order the Respondent relies on Rule 39 of the same Regulations as follows:-

    "(1) Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit."

23. The Respondent contends the claim is vexatious for the following reasons:-

    a. The Claimant's history of bringing weak and hopeless claims and applications within those claims;

    b. Adverse findings made against the Claimant in litigation to date;

    c. The spurious nature of the present claim.

24. In the alternative the Respondent says there is no reasonable prospects or little reasonable prospects of success.

25. I reminded myself that the meaning of vexatious was considered in a family proceedings case in The High Court in **Attorney General v Barker** [2000] EWHC 453 "*the hallmark of a vexatious proceeding is in my Judgment that it has little or no basis in law (or at least no discernable 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*". The Respondent also referred me to the case of **ET Marler Ltd v Robertson** [1974] ICR 72 where vexatious was used to describe the situation in which "*an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive*" and contended that this was a finding of fact for the Tribunal.

26. The Respondent provided me with a copy of the decision of Employment Judge Dean in her Costs Judgment in R bundle 2. In that Judgment dated 21 April 2015 at paragraph 33 Employment Judge Dean recorded as follows:-

> *"Whilst the Claimant has been blinkered in a distorted view as to the merits of his claim and unreasonably so, we have not been taken to any articulate argument to suggest that his motive was "improper" "*

27. The Respondent accepted this finding had been made by Employment Judge Dean and accepted also that just because a claimant has lost before it does not mean he will lose again or that he is vexatious in the latest set of proceedings.

28. The Respondent submitted that in order to strike out the claim as vexatious I must be satisfied the claim is hopeless. The Respondent contended the Claimant had a history of bringing claims, two of which have been dismissed by this Tribunal, and bringing many preliminary applications and appeals from preliminary decisions. The Respondent also submitted that the Claimant makes serious allegations including of a very serious misconduct nature and brings up matters time and time again which have already been determined against him.

29. The Respondent referred me to the Order of Employment Judge Broughton again in R bundle 2, dated 25 May 2017 in particular the following paragraphs.

> *"(6) The hearing started on an unhelpful note with the Claimant making an allegation that the Respondent had "deliberately" delayed production of the draft bundle. When asked what evidence he had of such intent, he became mildly belligerent, merely repeating the allegation. It transpired that he was unable to substantiate the allegation he was making. He suggested that I was being unjust by pointing this out to him.*
>
> I was also referred to paragraph 8
>
> *"(8) his (the Claimant) approach was one of seemingly polite disrespect. He would interrupt, return to matters dealt with or even attempt to re-open matters that had been decided in previous hearings. When I endeavoured to stop him and move forward, he would make veiled threats of appeals and complaints, exhibiting to my mind an unjustified sense of injustice".*
>
> Further I was referred to paragraph 21

> *"(21) The Claimant needs to understand and accept that his previous claims failed, as did his appeals against those determinations and indeed, the determination that he is engaged in such unreasonable conduct as to warrant a large costs award. These are not matters that can be re-litigated and he has to face up to the consequences and his actions and start to make preparation. There is no sign that, to date, he has done so. Rather, I was left with an increasing suspicion that he is using these current proceedings, whatever their merits, as a means to escape or minimise his existing liabilities. That would be an abusive process. I hope I am wrong and the Claimant's future conduct will demonstrate this".*

30. I note of course that those observations were made in proceedings 3 and 4 which are still live before this Tribunal and yet to be decided. I also note that whilst I was not referred to this paragraph by the Respondent Employment Judge Broughton went on to say at paragraph 22:

> *"It is, of course, equally true that the Respondent should not seek to unreasonably use their previous successful defences to attempt to defeat or deflect from these current claims"*.

31. The Claimant appeared to believe that in order to respond to the vexatious contention he was required to bring to my attention what he called inappropriate behaviours on the Respondent's part. He referred me to one of the Respondent's witnesses perjuring herself, the Respondent seeking to blackmail him in without prejudice correspondence and the Respondent bad mouthing him to the press at the same time as commencing bankruptcy proceedings against him in respect of cost orders previously made.

32. On the issue of whether the claim has no or little reasonable prospect of success the Respondent asked me to consider the strengths of the allegations in claim 5, the claim before me. It also invited me to find that if claim 5 was weak it was open for me to find there were grounds for inferring the claim was not brought for a proper motive, a submission linked to the vexatious argument.

33. The Respondent made the point this is the first claim in respect of the role of youth worker and that the claim concerns decisions of managers distinct from the Claimant's managers in his teaching post, which was the role giving rise to claims 1 to 4.

34. In terms of its submissions on the strength of the current claim the Respondent made the point that the Claimant had not set out in his ET1 the nature of his disability, or properly particularised his complaints or heads of claim. The Claimant had suggested that his claim was against two Respondents but had not properly articulated the individual Respondents named. The Claimant appeared not to have involved her in early conciliation. The Respondent also may take a time point. The Respondent submits it can offer legitimate and non discriminatory rationale for the facts complained of in relation to the disciplinary action relating to covert recording and for the warnings given under the attendance management policy. It contends the Claimant has not actually accused Mr Stringfellow, who decided the appeal against his grievance, of any discriminatory behaviour in his ET1 and that other matters are simply the Claimant complaining of day to day management issues.

35. The Respondent reminded me that the case involves public monies and the Respondent has already been put to considerable expense.

36. I heard submissions from the Claimant who referred to the second version of his skeleton argument produced to me on 25 September. I have already noted that he sought to contend the Respondent had behaved improperly throughout earlier proceedings as his response to the Respondent's contention that he had an improper motive in support of the vexatious argument.

37. On the issue of the prospects of success and strengths of the current claim the Claimant made the point that the Respondent's managing attendance policy was capable of discriminating against those with a disability and whilst it contained trigger points they were not mandatory and should be considered in the light of each employees circumstances. He alleged that Mr Stringfellow's decisions were discriminatory. He contended he had medical evidence establishing he ought to be permitted to use a Dictaphone and whilst he had therefore recorded what he said was only part of the meeting on 5 September 2016 he told me he openly admitted this at the time. He accepted this was his first claim regarding his youth worker post but argued it was still the same employer as he had litigated against in claims 1 to 4, the same HR team and that Danny Millard his direct line manager had been his line manager since 2008 ie during his teaching post also. He did not accept that the same decision makers were not the ones playing a part in what he says are ongoing discriminatory acts.

Strike out

38. In my judgment there was no evidence before me on which I could conclude that the Claimant was acting vexatiously. I reminded myself I must take the Claimant's claim at its highest. There has been at least one protected act in the bringing of previous proceedings and the Respondent was able to identify 19 potential issues in the current claim under 4 separate headings some of which are capable of being detriments. I note the Employment Tribunal had specifically found previously, the Judgment of Employment Judge Dean referred to above, that the Claimant's motive was not improper and whilst Employment Judge Broughton had made observations about the Claimant's conduct in other proceedings he had not made such a finding either.

39. I am unable to find that because the Claimant has brought previous proceedings and failed in some, his motive is improper in this case. I noted the Respondent's submission regarding the Claimant's attempts to re-litigate past matters. In my judgment he was doing so, and also making allegations of improper behaviour towards the Respondent, in this application because of his mistaken view that as the Respondent was challenging his motives and conduct in previous proceedings he should do the same.

40. Turning to whether I should strike out on the grounds of no reasonable prospect of success the Respondent's submission is that I should consider the strengths of the Claimant's case. I have already set out above the points made by both parties and that there is a clear dispute in fact as to the matters the Claimant alleges have occurred too his detriment.

41. I remind myself that the threshold for striking out a claim is high. In **Exsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330, the Court of Appeal held where there are facts in dispute it would only be "very exceptionally" that a case

should be struck out without the evidence being tested. In this case the Respondent suspended the Claimant for covert recording of a meeting. The Claimant contends he had the right to record the meeting, in light of medical recommendations, and it was not covert in that he admitted to it there and then and further it was only part of the relevant meeting. There was a clear dispute of facts on this one allegation alone and I cannot find that the facts alleged by the Claimant, taking his case at the highest, disclose no arguable case in law.

42. Further both parties in submissions referred me to **Anyanwu v South Bank Student's Union** [2001] ICR 391, a case which confirms the public interest in discrimination cases going to a full merits hearing. "*Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field, perhaps more than any other, the bias in favour of the claim being examined on the merit, or de-merit, of its particular fact is a matter of high public interest".*

43. I therefore conclude I cannot grant the Respondent's application to strike out.

44. Turning to the application for a Deposit Order I have to find little reasonable prospect of success to grant the Respondent's application. The Respondent referred me to the same points relied on in relation to the strike out application. As already identified above the claim does identify facts, albeit untested at this stage, and on which I make no findings to bind any future Tribunal in these or other proceedings, which do give rise to an arguable case of discrimination. To that end I cannot say there is little reasonable prospect of success and I refuse this application also.

45. I would like to remind the parties that whilst I heard evidence from the Claimant and had before me a large volume of documentation that was in the main irrelevant to this application, I have made no findings that should bind a Tribunal at future hearings but only in relation to the specific application before me.

46. I say this in part because I am aware that there are further issues between the parties that might require further clarification and/or further Preliminary Hearings in these proceedings. These matters seem to me be as follows:-

    1. The claim form appears to name an individual Respondent as well as the employer and the Respondent seeks clarification from the Claimant on this point.
    2. The Respondent wishes the Claimant to identify the disability or disabilities relied on in this case.
    3. The Respondent may wish to take a time point.
    4. The Claimant may be required to better particularise the claim as set out in the ET1.
    5. The Claimant on 21 September 2017 made an application by email to amend his claim. That application is yet to be determined.
    6. The Claimant on 21 September 2017 made an application by email to adduce without prejudice to correspondence. That application has yet to be determined.

47. I therefore invite the parties within 21 days of this Judgment to confirm to the Tribunal whether any further Preliminary Hearings, are required, to better progress of this case. If the parties identify that a further Preliminary Hearing is

required they should set out the reasons for this in writing along with any time estimates and availability.

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Employment Judge Hindmarch

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Date 10th October 2017