THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**

BETWEEN: **Mr G Kalu**

Mr O Ogueh

Claimants

AND

Brighton & Sussex University Hospitals NHS Trust

Respondent

ON: **23 February 2018**

AT: **London South Employment Tribunal**

Before: **Employment Judge Webster (sitting alone)**

Appearances:

For the Claimant: **Mr A Elesinnla (Counsel)**

For the Respondent: **Mr Kibling QC (Counsel)**

RESERVED JUDGMENT FROM A PRELIMINARY HEARING

1. The respondent's application for strike out for the claimants' claims of race discrimination and protected disclosure detriment insofar as they relate to the investigation carried out by Ms Hill QC, specifically those matters set out in the paragraphs 20 to 24 of the claimant's amended particulars of claim, is refused.

2. The claimant is ordered to pay a deposit to pursue claims of discrimination and detriment in so far as they relate to the investigation carried out by Ms Hill QC and are particularised at paragraphs 20-24 of the claimant's amended particulars of claim (Order attached).

REASONS

3. By an order dated 15 December 2017 the issues to be determined were set out as:

   3.1 Whether to strike out the parts of the claim that make allegations of discrimination and detriment about the investigation carried out by Ms Hill QC under rule 37 of the Employment Tribunals Rules of Procedure 2013 on the ground that they have no reasonable prospect of success;

   3.2 Subject to the above whether to make an order under rule 39 that the claimants pay a deposit as a condition of continuing to advance such allegations on the ground that such allegations have little reasonable prospect of success.

4. Subsequent to that order the claimants submitted a document entitled "Amended details of claim" (dated 21 December 2018) which set out the substance of their complaints regarding Ms Hill's report in more detail. They are covered at paragraphs 20-27 of the "Amended details of claim" document.

5. The respondent did not object to the claimants' application for this document to be accepted as being the claimants' amended particulars of claim and therefore this document is now accepted as the basis for the claimants' claims.

The Law

6. The provisions relation to striking out a claim are contained in Rule 37 The provisions relating to striking out a claim are contained in Rule 37 of the Employment (Constitution and Rules of Procedures) Regulations 2013. Rule 37 provides:

   "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 followings grounds –
   (a) That it is scandalous or vexatious or has no responsible prospect of success."

7. The main authority is Ezsias v North Glamorgan NHS Trust [2007] IRLR 603, CA. The Court of Appeal held:

"It would only be in an exceptional case that an application to an Employment Tribunal be struck out as having no reasonable prospects of success when the central facts are in dispute."

8. Regarding discrimination claims specifically the leading case is Anyanwu and Ors v South Bank Students' union and Ors [2001] IRLR 305 where the House of Lords held:

"Discrimination claims should not be struck out as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is vital in a pluralistic society. In the discrimination field perhaps more than other the bias in favour of a claim being examined on the merits of demerits of its particular facts is a matter of high public interest."

9. In Balls v Downham Market High School and College [2011] IRLR EAT it was held:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claimant has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects".

10. In Chandhok & Anor v Tirkey UKEAT/0190/14/KN Mr Justice Langstaff made the following comments:

"This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):

"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

"Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There

may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."

11. With regard to the application for a deposit order the appropriate provisions are contained in Rule 39 of the Tribunal Regulations 2013 which provides:
    (1) Where at a preliminary hearing the Tribunal considers that any specific allegations or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
    (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
    (3) The Tribunals reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
    (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out the consequences shall be as if no response had been presented as set out in rule 21.
    (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order –
    The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
    The deposit shall be paid to the other party (or if there is more than one to such other party or parties as the tribunal orders)
    Otherwise the deposit shall be refunded.

    (6) If a deposit has been paid to a party under paragraph 5(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit the amount of the deposit shall count towards the settlement of that order."

10. The legal principles applicable to making a deposit order are set out in Hemdan v Ishmail & Anor (Practice and Procedure: Imposition of Deposit) [2016] UKEAT 0021 where the President stated:

"10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered)

where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

…..

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise……. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

…

16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations.

…..

it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued…..

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be

ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

11. The threshold for making a deposit order is less than that for striking out a claim and in considering whether or not to make such an order a tribunal is entitled to have regard to the likelihood of a party making out any factual contention and reach a provisional view of the credibility of any assertion see Van Rensburg v The Royal Borough of Kingston-Upon-Thames and others UKEAT/0096/07.

12. In making a deposit order it is mandatory to have regard to the paying party's ability to pay – see R39(2) and if more than one deposit order is made it may be necessary to have regard to the totality of the orders Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14/JOJ and Hemdan v Ishmail.

Findings of fact and submissions

13. The tribunal was given written submissions by Mr Kibling and Mr Ellesinnla – both of which were elaborated upon orally. The tribunal also heard from Dr Kalu who had prepared a written witness statement and was cross examined by Mr Kibling.

14. There were relatively few relevant facts in dispute before me. Nor were there significant disagreements between the representatives as to the interpretation of the case law. Instead both representatives were asking me to take opposite approaches in how to apply the case law principles to the facts.

15. The respondent applied for strike out and/or a deposit order for two main reasons; firstly that this part of the claimants' claim was out of time and therefore had no reasonable prospects of success and secondly that it had no reasonable prospects of success because it had been substantially determined by another tribunal in a different case (that of Dr Lyfar Cisse).

16. The claimants have brought claims arising out of their employment and subsequent dismissal by the respondent. The claimants were dismissed on 27 September 2017 for gross misconduct and/or some other substantial reason. The claimants claim that their dismissal was unfair, discriminatory on grounds or race and victimization on grounds of race.

17. In their claim form dated 29 September 2017 they brought an application for interim relief which was not upheld by the tribunal.

18. The claims centre largely around various grievances and concerns raised by the claimants and their colleagues. A grievance was brought by the claimants' colleague, Ms E Burns, on 5 February 2014. The grievance was primarily about one of the claimants' other colleagues, Dr Lyfar-Cisse. The grievance was not upheld but it was critical of Dr Lyfar-Cisse. Dr Lyfar-Cisse is or was a member of the BME network at the respondent as are the claimants.

19. On 12 January 2015 the claimants' and 7 other members of the BME network brought a collective grievance stating, amongst other things that Ms E Burns' grievance was in of itself discriminatory on grounds of race.

20. Ms Hill QC was appointed to carry out an investigation into this situation. As a result of that investigation Ms Hill QC prepared a report dated 7 August 2015. That report found that the claimants had a disciplinary case to answer on the basis that their counter grievance could be seen as an act of victimisation against Ms E Burns. Ms Hill made no conclusions as to whether any disciplinary sanction ought to be imposed she simply concluded that there was a disciplinary case to be considered. As a result of that finding the respondent proceeded with a disciplinary process and at the end of the disciplinary process the respondent dismissed the claimants.

21. Ms Hill's report was given in August 2015 and sent to the claimant in soft copy on 11 August 2015. The respondent therefore argued that it was out of time by almost 2 years and the claimants had made no submissions as to why it was just and equitable to extend time.

22. The respondent argued that Ms Hill's investigation and report was a typical one-off act which had an ongoing effect as opposed to being part of a continuing series of events or an ongoing situation (Amies v Inner London Education Authority and Barclays Bank plc v Kapur). Ms Hill's report was the trigger for subsequent actions by the respondent but it was a one off report by a third party which prompted the respondent to act.

23. Mr Kibling put to Dr Kalu in cross examination that he was fully aware of Dr Lyfar-Cisse bringing a race discrimination and victimization claim about this report but chose not to do so himself at the time. It was put to him that had he wanted to rely on this report he should also have brought a claim himself at the same time as Dr Lyfar-Cisse. Mr Kalu denied that he knew about Dr Lyfar-Cisse's claim at the time because it was not his claim and he did not attend the tribunal nor give evidence to the tribunal and had no reason to be aware of the claim.

24. I do not find this plausible. The claimants and Dr Lyfar Cisse were part of an active network within the respondent specifically formed to challenge race discrimination. I therefore do not accept that when one of their members brought a claim for race discrimination other active members of the group would

not be aware of it. I conclude that Mr Kalu was aware of Dr Lyfar-Cisse's claim when she brought it.

25. It was the claimants' case before me that Ms Hill's report was a significant event during a series of discriminatory acts during their relationship with the respondent. They argue that this report was the trigger that commenced the disciplinary process which ultimately led to their dismissal. It was the first in series of discriminatory acts which ended in their dismissal and was therefore in time by virtue of the continuing act principle. They submitted that there was no way of divorcing this report from the subsequent chain of events and that it was therefore in time. This was an entirely different case from that brought by Dr Lyfar-Cisse who had not brought a claim about the termination of her employment. Her claim did involve concerns about Ms Hill's report but did not include all the subsequent events and issues about which the claimants now bring a claim, including their dismissal.

26. The respondent also argued that the claimants' claims arising out of Ms Hill's report were based on the same facts as those advanced by Dr Lyfar-Cisse and therefore the previous determination of this aspect of Dr Lyfar-Cisse's claim was also, to all intents and purposes, a determination of this part of the claimants' claim and that given Dr Lyfar-Cisse had lost her claims their claims about this matter did not have a realistic as opposed to a merely fanciful prospect of success.

27. The respondent states in submissions that the list of issues before the Dr Lyfar-Cisse tribunal included direct race and victimisation in respect of the findings and conclusion in Henrietta Hill OC's report (investigation and conclusion) and these are identical to the issues identified by the claimants in their amended claim form.

28. The claimants assert, as mentioned above, that Ms Hill QC's report fits into the factual matrix of their claims very differently from how it fitted into Dr Lyfar-Cisse's claim and that therefore the previous tribunals' assessments of the report cannot be determinative of their claims about the report.

Conclusions

29. I find that it is difficult, on the basis of the evidence before me, to determine that this was a one off act that can be divorced from the remaining employment of the claimants. The claimants argue that this is a complex situation whereby the facts have to be considered before it can be determined whether there is a series of ongoing acts and I agree that I do not have sufficient evidence to conclude that there is no possibility whatsoever of them establishing a series of events or a continuing act. Ultimately, they were dismissed on 22 September 2017 due to disciplinary action which started, at least in part, because of the findings in Ms Hill's report that there was a disciplinary case to answer. This is a very different factual matrix from the reasons behind Dr Lyfar-Cisse's discrimination claim.

30. The claims are in time if they can be shown to be part of an ongoing situation/series of acts and I conclude that I do not have sufficient evidence to be able to conclude that the claimants have no prospects of success on demonstrating that Ms Hill's report was not part of that continuing situation culminating in the claimants' dismissals.

31. However I do consider that there are little prospects of success in the claimants establishing that this was part of a continuing act by the respondent as opposed to a one off incident with continuing consequences. It is a report prepared by a third party after which the respondent decides to take action. Mr Elesinnla made no submissions about it being just and equitable to extend time if the tribunal were to find it was out of time. I therefore conclude that on the time point alone the claims are likely to have little prospect of success.

32. I have also considered whether the previous determinations by two tribunals that Ms Hill's report was not discriminatory are sufficient for me to determine that this part of the claimants' claim has already been shown to have no reasonable prospect of success because the claimants' claims are based on the same facts.

33. In the strike out/deposit order decision Employment Judge Freer found that Dr Lyfar-Cisse's claim had little reasonable prospects of success on the basis that the report was reasonable and not likely to be, in of itself, a discriminatory report. It was then considered at a full hearing by a full tribunal. There the tribunal found that it was a reasonable report and in no way discriminated against Dr Lyfar-Cisse on grounds of race.

34. In coming to my decision I have had to consider the fact that this is an entirely different claim brought almost 2 years after Dr Lyfar Cisse's claim of 11 August 2015. I accept that Ms Hill's report and its content are fundamental to both the claims but the context for the previous tribunal determinations were a case brought by Dr Lyfar-Cisse, who had not been dismissed at the time and who was not relying on approximately two years' worth of subsequent facts.

35. Further, as stated above it was Dr Lyfar-Cisse's actions which had apparently prompted Ms Burns to bring a grievance against her and the claimants and 7 others to bring their counter grievance. Therefore the claimants' relationship to and involvement with the report were different to those of Dr Lyfar-Cisse.

36. I accept that the previous determinations of Ms Hill's report have been thorough and well-reasoned and come to conclusions about the report and its impact with regard to a specific set of circumstances. However the impact of the report and its conclusions have not been determined within the context of the facts that these claimants advance. I cannot therefore say with certainty that this part of the claim has no prospect of success because I have not been able to consider

and determine all those facts and therefore I cannot order this part of the claim to be struck out.

37. I cannot conclude that, in the context of a different factual matrix, the claimants would not be able to establish that the report is discriminatory or an act of victimisation when viewed in a broader or different factual matrix than that which the previous tribunals considered it or that which I have been given the opportunity to consider at this preliminary stage.

38. However I do consider that the detail and assessment of the previous tribunals' judgments leads me to conclude that this part of the claimants' claim has little prospect of success. The previous tribunals that have considered the report found it to be carefully written, well considered and have no element of race discrimination in it. I have also read it and cannot see, on the face of it, any aspect of race discrimination in the report. Nothing has been presented to me that indicates that there is something that will change those conclusions but, as stated above, I cannot be certain that it will not be given the different context. This is not me concluding that 'something might turn up' (Patel v Lloyds Pharmacy ltd [2013] UKEAT/0418/12) in evidence but is a recognition of the differences between the claimants' claims and those of Dr Lyfar-Cisse which cannot be properly explored at this preliminary stage.

39. The Tribunal may take the claimant's means into account when making its order. Neither party, despite both being represented by counsel, made any submissions regarding the amount of the deposit and the means or ability of the claimants to pay a deposit.

40. I have considered that the value of the deposit is not meant to be a barrier to access to justice but is meant to encourage the claimants to consider the value of proceeding with those claims. Given that I have concluded that this part of their claim has little prospect of success for two separate reasons (time and substantive merit), I believe it is appropriate for the level of the deposit to be £1,000 in total.

41. The Orders enacting this Judgment are set out in a separate Orders document also dated 25 March 2018.

Employment Judge Webster
Date: 25 March 2018