Case No: 2207504/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr Yu Tan

Respondents: Ministry of Justice and others

Heard at: London Central **On:** 19 December 2018

Before: Employment Judge H Grewal

Representation

Claimant: No appearance

Respondent: Mr A Allen. Counsel

JUDGMENT

1 The application for an adjournment is refused.

2 The claim is struck out.

REASONS

1 The Tribunal listed this preliminary hearing to determine whether the claim should be struck out on any of the following grounds:

(a) It has no reasonable prospect of success;
(b) The manner in which the Claimant has conducted proceedings is unreasonable;
(c) The Claimant's failure to comply with the Tribunal's orders;
(d) the Tribunal considers that it is no longer possible to have a fair hearing.

Notice of the hearing was given to the parties on 19 October 2018 and on 21 November 2018.

Procedural History of the case

2 In a claim form presented to the Tribunal on 24 October 2017 the Claimant complained of discrimination on the grounds of race (Chinese) and religion or belief (Catholic). The particulars of claim are lengthy and unclear, but the essence of the complaint is simple and as follows. On 31 March 2017 the Claimant was appointed a lay magistrate. On 19 May 2017 he informed the Respondent that he was pursuing a civil action against a number of bodies, including the police. On 30 May 2017 the Advisory Committee on Justices of the Peace for the North and East London area advised him to refrain from sitting until his civil action was concluded because his involvement in a civil action against the police could well give rise to a perception of bias in the eyes of the public. He was advised that if he did not agree to refrain from sitting, the Committee would need to consider whether it should contact the Lord Chancellor to request that he be suspended from the active list. The Claimant entered into correspondence on the issue with the Advisory Committee. On 12 June 2017 he said that as he had been left with no choice but to accept the unfair decision not to sit, he accepted it.

3 In its response the Respondent stated that it would be asking for a preliminary hearing to consider its applications to strike out the claim on the grounds that it had no reasonable prospect of success or for a deposit order on the grounds that it had little reasonable prospect of success.

4 On 28 December the Claimant applied for a stay of three months. The application was supported by a letter from his GP dated 18 December 2017. He said that there had been a recent flare up of the Claimant's underlying conditions (pan-ulcerative colitis and congenital lymphohemangioma) and that he was not fit at that time to participate in a legal hearing. He would need approximately three months to recover. The Respondent did not oppose that application. No further action was taken to progress the claim for a period of three months.

5 On 23 March the Claimant applied for the case to be put on hold until October 2018 because of his medical condition. A letter from his GP dated 13 March 2018 stated that the hemangioma had redeveloped which caused bleeding during flare ups triggered by cold or stress. She said that he was due to have major oral surgery from which he would take several months to recover.

6 On 23 June 2018 the Tribunal asked the Claimant to provide evidence from the hospital treating his hemangioma setting out when the oral surgery was due to take place, what its impact would be and when he would be able to participate in a case management hearing lasting two hours. There was no response to that. On 14 July the Tribunal sent the parties notice of a case management preliminary hearing listed to take place on 9 August 2018.

7 In a letter dated 26 July 2018 the Claimant applied for the case management hearing to be adjourned to January 2019. His grounds for doing so were that the Central London County Court had stayed his case before it until 31 October 2018. He said that the oral surgery had taken place on 19 April 2018. In support of that application he enclosed letters from consultants treating his two conditions. They

were dated November and December 2017. They were written in support of his application for disability benefits. It appeared from those letters that the Claimant had had the lymphohemangioma since 1993 and the ulcerative colitis since 2001. They said that he needed to rest at home when the conditions flared up. None of those letters addressed the Claimant's abilities to participate in a hearing in August 2018.

8 The Claimant's letter ran into many pages and contained applications for orders and directions that the Tribunal has no power to make or were just plainly ridiculous. These included an application that the Government Legal Service should assist him because he was a magistrate, the Tribunal should give him interim relief because police officers and their lawyers had bullied, harassed and victimised him since he had sued the police for corruption, and the Tribunal should give a default judgment in his favour and allow him to sit as a magistrate. The reasonable adjustments that he sought for the hearing included his not having to communicate with the Respondent or to send them copies of any applications that he made to the Tribunal, the Employment Judge bowing to him and everyone in the Tribunal addressing him as "Your Worship", the Tribunal not making a costs order against him and if anyone in the Tribunal treated him with contempt the Employment Judge should press the alarm to call the police to arrest the perpetrator of contempt of court.

9 On 3 August the Tribunal wrote to the parties that I had postponed the hearing listed for 9 August because there was uncertainty as to the Claimant's ability to attend the hearing because of medical reasons. The Tribunal made the following order,

> "*By 24 August 2018 the Claimant is to provide an up to date medical report setting out his diagnosis, an opinion as whether he is able to participate in a short two hour hearing and, if not, why not and when it is anticipated that he will be able to do so."*

10 The Claimant appealed to the EAT against that order on 8 August 2018. The EAT ruled on 13 August that the appeal had no reasonable prospect of success. HHJ Eady said,

> *"The Employment Tribunal's order regarding medical evidence was made for a very specific purpose; it is plainly seeking to understand how the Appellant's condition impacts upon the listing of a short hearing that is required. The Employment Tribunal is entitled to seek that information and to be assisted by the Appellant in the way identified. That Case Management direction discloses no error of law. As for the potential difficulties arising from the time-frame for compliance, if that really does give rise to insurmountable difficulties, the appropriate course would be for the Appellant to apply to the Employment Tribunal for a variation to its Order."*

11 On 14 August 2018 the Claimant applied for a variation of the order and asked that he be given until mid-November to provide the medical evidence. He said that his next medical review was in mid-September 2018. On 29 August 2018 the Tribunal extended the time for providing the medical evidence to 28 September 2018.

12 On 29 August 2018 the Claimant sent the Tribunal an email comprising 19 pages. In that email the Claimant applied for his case to be stayed while he pursued his appeal further in the EAT, the Court of Appeal and by way of judicial review and

pending action on potential appeals to the International Criminal Court, the European Court of Human Rights and the European Court of Justice, for his case to be transferred to London East and for a different judge to handle his case. He did not specify what conduct on the part of the Employment Judge had given the appearance of bias. He accused the Respondent's lawyers of "*severe harassment"* which was "*unprecedented"* and referred to them as "*bullies".* He referred to a letter from the lawyers as being "*unprofessional and vexatious".*

13 A large part of that email, like many other communications from the Claimant, was devoted to setting out how the Claimant was connected to, and highly thought of, by the upper echelons of the judiciary and the government. These included past and present Prime Ministers, Supreme Court Judges, Lord Chief Justices and Masters of the Rolls. He referred to himself as "national treasure" and said that he had been voted "one of the ten most distinguished Judicial Office holders". How he had managed to achieve that distinction without ever having sat as a magistrate is a mystery. That information has no bearing upon the applications that the Claimant was making. The only purpose of inserting it in the application was to suggest that the Claimant should be given preferential treatment because he is such an important person. Such a suggestion is highly objectionable and wholly contrary to the rule of law and the principle that everyone is equal before the law.

14 On 3 September the Tribunal wrote to the Claimant setting out my decision on his applications. The application for a stay and for his case to be handled by a different judge were refused as there were no reasonable grounds for doing so. The application to transfer to London East was premature as no hearing date had been set yet and the Tribunal did not have the medical evidence that it had requested.

15 On 7 September the Claimant again applied for a stay on the grounds that on 5 September he had formally requested a rule 3(10) hearing at the EAT.

16 On 9 September the Claimant applied for a review of the Tribunal's decision of 3 September. The application comprised 18 typed pages. The Respondent opposed that application in a short email (less than half a page) on 10 September. On 19 September the Claimant replied to "*the unsolicited email from the Respondent's lawyer*".

17 The Claimant did not provide the medical evidence that he had been ordered to provide by 28 September 2018.

18 On 10 October the Tribunal wrote to the Claimant. It was pointed out that the Tribunal's orders of 3 September 2018 were case management orders and that the Claimant's application was treated as an application to vary those orders. Having considered his emails of 9 and 9 September 2018 I did not consider that there were any grounds for varying the original orders.

19 The Claimant sent further lengthy emails to the Tribunal on 1 and 8 October. They were repetitive, full of useless information and essentially repeated his applications for his case to be stayed until March 2019. He stated that lawyers and doctors had advised him not to read emails and letters "*from the aggressive lawyers who made him feel threatened or humiliated as it would harm his chronic medical conditions and delay recovery from flare ups."* He said that his email account would be checked by his supporters once a month.

20 On 19 October 2018 notice was sent to the parties of the preliminary hearing to consider striking out the claim on the grounds set out in paragraph 1 (above). Nearly a year had elapsed since the claim had been presented and it had not progressed at all.

21 On 5 November a letter comprising 53 pages was sent to the Tribunal. It was ostensibly sent on behalf of the Claimant by a charity but it is clear from the style and content that it has been written by the Claimant. The gist of it was that the Claimant had been medically certified as very ill until April 2019 and was unable to participate in the proceedings until that date. No medical evidence to that effect was attached to that email. That email was not copied to the Respondent.

22 The Claimant's application for a stay was refused on 21 November on the grounds that nothing had changed since I had first refused the application on 3 September and to vary on the order on 10 October 2018. A further incoherent and rambling application for a stay was made on 5 December 2018. It was not supported by any medical evidence. It was not copied to the Respondent. The Claimant stated in that email that "*due to the threatening and objectionable behaviour from the respondents and their lawyers"* he had received legal advice that he should avoid any contact with them.

23 The Claimant's appeal to the EAT was dismissed on 12 December 2018. In dismissing it Lady Wise said,

> "*It seems to me that this proposed appeal is nothing more than a blatant attempt to justify non-compliance with a legitimate case management Order made by the Tribunal… It raises no question of law and is tantamount to an abuse of process. The decision to be appealed was well within the wide discretion of the Employment Tribunal Judge on case management orders."*

24 On the morning of 19 December at 8.45 an email was sent to the Tribunal, again ostensibly from the charity but clearly written by the Claimant. It said that that morning he had received a parcel from the Respondent and his family had realised that a hearing was taking place that day. There was a medical letter dated 7 September attached to that email. It said that the Claimant had not sent that to the Tribunal because he had been waiting for the judge to be changed and would have sent it to the new judge. The application to change the judge had been refused on 3 September 2018. The email also said that the Claimant gave consent for the medical letter to be read by a new judge and did not consent to it being disclosed to the Respondent. The letter of 7 September 2018 was from the Claimant's GP. It confirmed that he had the two medical conditions of which the Tribunal is aware. It stated what those conditions could cause in the way of symptoms. It did not say whether the Claimant currently had those symptoms. In light of his underlying health issues the doctor concluded,

> "*I would concur that he would be deemed medically unfit to participate in active legal proceedings at present. It is difficult to provide an exact recovery time but I will advise reviewing the situation in approximately six months."*

The email said that as the Claimant had been certified as medically unfit to fight legal battles since 7 September he had been unable to read any correspondence relating

to the case since 8 October 2018. He applied for the hearing that day to be adjourned and for the case to be stayed for at least six months and possibly longer while he pursued his appeal to higher courts if the EAT had dismissed his appeal. It said that even if the Claimant had not been ill he would not have attended the hearing because the Tribunal had refused to change the Employment Judge about whom he had complained.

Application to adjourn the hearing

25 In considering the application to adjourn the hearing, I took into account the following matters. The Claimant had had the letter which formed the basis of his application today since 7 September 2018. Since that date the Claimant or the charity ostensibly writing on his behalf had written numerous letters to the Tribunal seeking a stay of the proceedings. They had not sent the doctor's letter of 7 September 2018 in support of any of those applications. The Claimant's explanation for not doing so (he was waiting for a new judge to be allocated to his case) is neither satisfactory nor credible. It is not a good reason for not sending the letter. He had been told on 3 September that case was not going to be given to a different Judge.

26 In any event, there is nothing in the letter that would lead me to adjourn the hearing. It merely confirms that the Claimant suffers from two conditions. He has suffered from one of those conditions since 1993 and the other since 2001. The mere fact that he suffers from those conditions does not make it impossible for him to attend a hearing. If that were the case, he could not have been appointed to sit as a magistrate or done any of the other wonderful things which he claims to have done. Nor would he ever be well enough to participate in this case because he is going to continue suffering from those conditions.

27 The doctor's letter sets out what the effects of those conditions can be, but it does not address the important question of whether they were having any of those effects on the Claimant in December 2018 and, if they were, when it was likely that they would cease. It also appears from the language used by the doctor that he is agreeing with a view expressed by the Claimant rather than expressing his own diagnosis. The letter did not say that the Claimant would be well enough to participate in a hearing in six months' time. It simply said that the situation should be reviewed in six months' time. I was, therefore, not satisfied on the basis of that medical evidence that the Claimant was not well enough to attend the hearing or that he would be able to do so in the foreseeable future.

28 The Claimant had had sufficient notice of the hearing. There was no medical evidence that the Claimant had been unable to read communications form the Tribunal since 8 October. Furthermore, I concluded that he had written the emails that were ostensibly sent by the charity. I did not, therefore, accept that he had been unaware of the hearing until he received the bundle from the Respondent. It was clear to me from all the communications that have been received from the Claimant that he had no intention of attending a hearing in this case. It was nearly 14 months since the claim had been presented. There are three named Respondents in this case. The case needed to proceed. The Claimant was seeking an adjournment for six months. The medical evidence did not state that he would he well enough to attend at that stage. All the indications were that it was extremely unlikely that the Claimant would attend a hearing in six months' time if I adjourned the hearing.

29 Having taken into account all the above matters, I refused the Claimant's application to adjourn the hearing.

Whether the claim should be struck out

The Law

30 Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 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 following grounds –*
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or otherwise vexatious;*
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
> *(d) that it has not been actively pursued;*
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response 9or the part struck out).*"

31 Rule 2 of the Employment Tribunals Rules of Procedure 2013 provides,

> "*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with cases fairly and justly includes, so far as practicable –*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(d) avoiding delay, so far as is compatible with proper consideration of the issues; and*
> *(e) saving expense.*"

32 Article 6(1) of the European Convention of Human Rights provides,

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

33 The test of no reasonable prospect of success is a lower one that no prospect of success. In determining whether a claim has a reasonable prospect of success the issue is whether it has a realistic as opposed to a merely fanciful prospect of success – **Ezsias v North Glamorgan NHS Trust [2007] ICR1126, at paragraphs 25, 26**.

34 It was emphasised by the House of Lords in **Anyanwu v South Bank Student Union & Another [2001] ICR 391** that tribunals should be cautious about striking out claims in discrimination cases. Lord Steyn said, at paragraph 24,

> "*…such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. 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 a claim being examined on the merits and demerits of its particular facts is a matter of high public interest."*

35 That case, however, is not authority for the proposition that a tribunal should never strike out a discrimination claim. In the same case Lord Hope said, at paragraph 39,

> "*Nevertheless I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunal ought not to be taken up by having to hear evidence in cases that are bound to fail"*

36 If the claimant's case is prima facie implausible or the undisputed facts of the case are incapable of giving rise to a prima facie case of unlawful discrimination, the case must be struck out. It is not legitimate to allow a case to proceed to trial in the hope that "something may turn up" during cross-examination – **ABN Amro Management Services Ltd & Another v Hogben EAT/0266/09**.

37 There may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success. What is important is the particular nature and scope of the factual dispute in question. It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute – **Ezsiaz v North Glamorgan NHS Trust** (above), **at paragraphs 27 and 29.**

38 In **Ahir v British Airways PLC [2017] EWCA Civ 1392** Underhill LJ said, at paragraph 16,

> "*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."*

39 In determining whether to make a strike out order under rule 37(1)(b) or (c) the Tribunal must ask itself the following three questions –

(a) Has the party in question conducted proceedings in an unreasonable manner or failed to comply with a Tribunal order?
(b) Has the unreasonable conduct taken the form of deliberate and persistent disregard of required procedural steps or made a fair hearing impossible?
(c) If it has, is striking out a proportionate response?

That test is set out in **Bolch v Chipman [2004] IRLR 140** and **Blockbuster**

Entertainment Ltd v James [2006] IRLR 630.

40 In **Riley v Crown Prosecution Service [2013] IRLR 966** the Court of Appeal held that if doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case deals with maters that are already in the distant past, striking out on the basis that a fair hearing is not possible within a foreseeable period must be an option available to tribunal.

Conclusions

No reasonable prospect of success

41 The central facts in this case are not in dispute. In order for the Claimant's complaints of direct discrimination or harassment to succeed, he would have to establish a prima facie case that he was treated less favourably than an actual or hypothetical comparator in similar circumstances was treated or would be treated and that the reason for it was race or religion. The Claimant has not pointed in his lengthy particulars of claim to another lay magistrate who was permitted to continue sitting after the Respondent had learnt that he or she had an ongoing civil action against the police. He has not set out any material from which the Tribunal could infer that had he not been Chinese or Catholic the Respondent would have approached the matter in a different manner. The mere fact that he is Chinese and Catholic and was asked not to sit after he informed the Respondent of his action against the police is not evidence from which the Tribunal could infer discrimination. Something more would be required and there is nothing in the Claimant's rambling particulars of claim which amounts to that something more. It is difficult to imagine how the Respondent could possibly allow any lay magistrate, who had an ongoing legal action against the police, to sit as a magistrate. The police are involved in all criminal prosecutions in the magistrates' court. The perception of bias is unavoidable if the person hearing the case has an ongoing case against the police.

42 The Claimant has also referred to indirect discrimination and victimisation in his particulars of claim. However, he has not identified in the particulars any provision, criterion or practice that has a disproportionate impact on Chinese people or Catholics. Equally, he has not identified any protected act.

43 I am conscious of the fact that we should be very cautious about striking out discrimination cases and that we should do so only in the most obvious and plainest cases. I am satisfied that this is such a case. The central facts are not in dispute. Those facts are incapable of giving rise to a prima facie case of unlawful discrimination. This claim has no realistic prospect of success.

Whether a fair hearing is possible

44 What caused me real concern in this case is that some fourteen months after this case started, there has been no progress at all in this case. We have not been able to take the first step in the proceedings which is to have a short case management discussion to clarify the issues and make orders to prepare for a hearing. That first step is the easiest step in the proceedings, and the Claimant has been either unable or unwilling to take that step. There is a long way to go and the steps that follow will require much more involvement from the Claimant; he will have to deal with disclosure, preparing witness statements, and preparing for the hearing. If in the past

fourteen months the Claimant has not been able to take the first simple step, I think that it is extremely unlikely that in the next twelve or fifteen months he will be able to take all the steps that will be required of him to ensure that a hearing takes place.

45 My fears to that effect are confirmed by the medical letter of 7 September 2018 which does not state that in six months' time the Claimant will have recovered sufficiently to participate fully in the process, but simply states that the position will have to be reviewed at that stage.

46 It is clear to me from many of the statements made in the Claimant's numerous emails to the Tribunal that he has no intention or desire to assist in the matter proceeding to a hearing. He wants to do everything that he can to delay and obstruct a hearing. I give a few examples. He has asked for a change of judge although he has not identified what it is that I have done that shows actual or perceived bias. Two judges in the EAT have said in the clearest terms possible that the case management order that I made was a proper order. Nevertheless, the Claimant wants to pursue that matter to the highest courts in the UK and beyond. He has still not complied with that order. He has made many other demands about how the proceedings should be conducted that are improper, unrealistic, unfair or just ridiculous.

47 The overriding objective is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the EHCR emphasises that every litigant is entitled to a "fair hearing within a reasonable time" That is an entitlement of both parties to litigation. In addition to the First Respondent in this case, there are three named Respondents. Serious allegations of discrimination have been made against they and they are entitled to have those matters determined within a reasonable time.

48 Having considered all the above matters and the Claimant's conduct of the proceedings to date and in the absence of any clear medical evidence or any other sign that we can start to progress this case in the near future, I considered it unlikely that we would ever be able to have a hearing of this claim. I certainly cannot see it happening in the next 15 to 18 months.

Failure to comply with Tribunal orders/unreasonable conduct

49 The Claimant did not comply with the Tribunal's order of 3 August 2018 by 28 September, and has still not complied with it. He has not provided any explanation for not doing so. He obtained a medical report on 7 September 2018 but that did not address the issues which the Tribunal had ordered him to address. He only provided that report to the Tribunal on 19 December 2018. The Claimant's failure to comply with that order without any good reason amounts to unreasonable conduct of the proceedings.

50 That, however, is not the only instance of unreasonable conduct of the proceedings by the Claimant. The Claimant's entire engagement with the Tribunal has been obstructive rather than constructive. He has sent a large number of emails to the Tribunal. They have been long and repetitive and full of useless information and conspicuously lacking in useful information. It takes a long time to read each one and to ascertain what application, if any, the Claimant is making. Many of the Claimant's applications have not been copied to the Respondent and he considers it right that he should not have to communicate with them. He objects to receiving

perfectly legitimate communication from the Respondent relating to the proceedings, and it has led to him accusing them of being aggressive and bullies, threatening, humiliating and harassing him and their lawyers of being unprofessional and vexatious. He has made unreasonable, impractical and outrageous demands about how the proceedings should be conducted. He has made copious references repeatedly to the senior members of the judiciary and political figures whom he knows. He is entitled to have his delusions of grandeur but he is not entitled to entitled to seek preferential treatment from the Tribunal on the grounds that he is well-connected. That is scandalous and unreasonable conduct of proceedings. The amount of judicial resources that have been spent dealing with the Claimant's communications is wholly disproportionate to the progress the claim has made. In fourteen months the Claimant has not done anything positive to move his case forward but has done much to stop it progressing. His prolific communication with the Tribunal belies his claim that he is not well enough to engage with this process.

51 For the reasons set out in paragraphs 44-48 (above) I concluded that a fair hearing is not possible. For the reasons set out in paragraphs 41-50 (above) I do not consider that there is some other step I can take that would lead this matter coming to a hearing within the foreseeable future. I am satisfied that striking out is a proportionate response.

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Employment Judge Grewal

Date 4 March 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

6 March 2019

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FOR THE TRIBUNAL OFFICE