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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Christian Mallon**

Respondent: **Aecom Ltd**

Heard at: **East London Hearing Centre**

On: **9 May 2019**

Before: **Employment Judge Burgher**

Representation

Claimant: In person

Respondent: Ms T Barsam (Counsel)

JUDGMENT ON PRELIMINARY HEARING (OPEN)

The Claimant's claim is struck out and is therefore dismissed.

REASONS

1 The matter was listed before me for a preliminary hearing to consider:

1.1 Whether to strike out all or any part of the Claimant's claim on the grounds that it had no reasonable prospect of success pursuant to rule 37 the Employment Tribunal rules;

1.2 Whether to order the Claimant to pay a deposit in respect of any allegation as a condition of continuing the claim pursuant to rule 39 of the ET rules; and

2 I was provided with a 137 page bundle of documents and was referred to relevant pages during submissions.

3 The issues in the case were summarised by Employment Judge Russell in the Preliminary Hearing on 8 February 2019 as follows:

> The issues between the parties which fall to be determined by the Tribunal are as follows:

3.1 Did the Respondent apply a provision, criterion or practice (PCP) in that it required an on-line application form as a pre-condition to being considered for employment?

3.2 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that due to his dyspraxia he struggles with on-line systems? The Respondent will say that the Claimant was not required to complete the on-line test personally and that somebody could do it on his behalf.

3.3 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The Claimant will say that the Respondent should have permitted him to make an oral application. The Respondent will say that this was not reasonable and that other help was offered.

4 Ms Barsam submitted that the Claimant's claim should be struck out on the basis that it is vexatious and/ or that it had no reasonable prospects of success.

5 The basis of the submission that the Claimant's claim was vexatious was the fact that there were 29 previous Employment Tribunal decisions that the Claimant had submitted from 2018 to date that had been made and either dismissed or withdrawn by the Claimant. It was submitted that the Claimant made a number of applications against recruitment agencies, which it was alleged involved similar facts to the current claim.

6 Ms Barsam referred me to the judgments of 3 separate Employment Tribunal claims that were referred to in support of her application.

7 In the Claimant's claim against DEFRA, case number 4/17FET/1408/16 the Fair Employment Tribunal dismissed the Claimant's claim for failure to make reasonable adjustments in not shortlisting him for the role. In that case, the Claimant stated that he would like to apply for role however he had a learning difficulty so he could not complete forms. He requested his CV to be accepted for the role. The Respondent in that case offered three alternatives to the Claimant to advance his application including posting a hard copy of the form for him to complete with the assistance of someone else or for someone else to complete it on his behalf; for someone else to complete the online form for him and send it back; and if neither of those were possible for the Claimant to reply to them to see if anything else could be put in place. In that case a proposal was agreed for a Respondent's representative to speak to the Claimant about the form and discuss it on the telephone. Findings were made that the Claimant had asked his partner for help in activating the online account [paragraph 41] and that the Respondent's officer went further than he was expected to go and that the Claimant's attitude was that it was the Respondent's responsibility to elicit a completed application form from him [paragraph 31].

8 The Fair Employment Tribunal found that the Claimant could have got help from someone else to complete the form, including a job centre, and it expressly rejected the Claimant's evidence that it was a problem for him to speak to his partner to do this [Paragraph 55 and 56]. The Fair Employment Tribunal accepted the Respondent's position in this case that no responsibility was taken by the Claimant to seek assistance from any source other than the Respondent. In these circumstances it was found that there was no PCP that placed the Claimant at a substantial disadvantage as he could have obtained help to fill it in and his disability did not impede him from getting such help.

9 The second case referred to was the Claimant's claim against MBA Notts Limited. The Claimant sought an 'oral application' namely a phone call in order to make his application. The allegation in this claim relate to make the application by way of a written CV. The Claimant alleged that he could not adequately convey his suitability in writing. The Employment Tribunal found in this case was not convinced that there was a PCP (of completing a CV) that placed the Claimant at a substantial disadvantage as he did complete a detailed and comprehensive CV and there was no explanation why, if the Claimant had the relevant experience, it was not mentioned in the CV. The Tribunal went onto find that even if an adjustment was made the Claimant would not have demonstrated he would have been appointed. This claim was struck out and it was opined that had this not been the case a deposit order would have been made.

10 The third claim referred to was the Claimant's claim against John Lee Recruitment Limited (1302097/2018). The Claimant was ordered to pay £3995 as a proportion of the Respondent's costs in this claim. No details of the judgment on merits was made available.

11 Ms Barsam was submitted that the catalogue of claims that the Claimant has brought, particularly against recruitment agencies, indicates that the Claimant's claims are vexatious. She further submitted that the Claimant, who lives in Stafford had no real intention of wishing to be employed in the role which was based in London.

12 The online application form screenshots were referred to. They request the Claimant's email address, to create a password, answer a security question. If this part is completed the Claimant would have been required to put his name, address, personal details, education, work experience, skills, upload a CV and complete an equality and diversity tickbox. It was submitted that the online form was not more involved than the numerous Employment Tribunal complaints that the Claimant was able to submit online.

13 The Claimant responded to this submission by stating that 17 of his claims withdrawn prior to September 2018 were presented as a result of his lack of knowledge of the requirements to advance a claim. I find it difficult to accept this explanation as plausible given the detailed findings of the Defra judgment that was heard in March 2017.

14 In addition the Claimant stated that he withdrew the remaining 12 claims from 2018 to 2019 as a result of the costs judgment in John Lee Recruitment

Limited case. The Claimant stated that he maintained his claim in this matter because it concerns an online application form which is different he says to all the claims he has withdrawn which he says concerned CV applications as a PCP when he require an oral applications.

15 The Claimant stated that he requested an oral application instead of the online with the Respondent in this matter but this was not provided. He stated that he was genuine in his desire to work in London as he has had very long commutes to work for significant periods in previous roles.

16 The contemporaneous emails that were sent between the parties from 7 August 2018 to 29 August 2018 were referred to. The Respondent sent several emails to the Claimant asking the Claimant to provide details of the assistance he required in submitting the form so that his disability could be accommodated. The Claimant did not respond with any details. However, he consistently requested an 'oral application'. The Claimant's position was that the only way in which he was prepared to progress the application would be by way of oral application.

17 He stated before me that he cannot engage with online forms, password characters and dropdown menus. This was not conveyed to the Respondent at the time who were, on the face of it reasonably requesting from the Claimant what parts of the online process were said to be problematic. Further, the Respondent in this matter was also aware that the Claimant had in fact completed online forms for them when he worked with them previously.

18 The Claimant asserted that he could not ask his wife for help in completing the online form as she was not his carer; he was embarrassed to asked friends for help as they did not know that he suffers from dyspraxia; and it would have taken too much time to go to an advice centre for assistance. In respect of the online form that he had previously submitted to the Respondent, he stated he asked his wife for assistance with that because it was a job offer as opposed to an application. I was unable to accept this distinction as likely to be credible.

19 It is evident that it was the Claimant's choice about who to ask and who to seek assistance from. It is reasonable to infer that if the Claimant was genuinely interested in the role he would have sought assistance in progressing the online application form. In view of the fact that the Claimant was aware of previous Tribunal findings against him on this specific matter it is like to be implausible for the Claimant to continue to maintain that he could not have availed of assistance.

20 When addressing the submission that the online form was not more involved than the numerous online Employment Tribunal claims he has made, the Claimant stated that he was now experienced at submitted Employment Tribunal claims and was familiar with the process. This did not apply to online processes that he had not encountered before and he would need time to handle them.

21 The Claimant stated that he has approximately £46,000 in equity shared in his home shared between him and his partner, his has credit card debts of £8500

and savings of £550. He stated that he has resigned from his £50,000 role and his last day of work was last Friday.

22 The relevant legislation is a follows:

23 Strike Out

37.—(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;

(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 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 (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

24 Deposit

39 (1) Where at a preliminary hearing (under rule 53) 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 ("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 Tribunal's 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—

(a) 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

(b) 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.

25 The main authorities I considered are as follows:

26 In respect of vexatious claims Ms Barsam referred me to the case of Her Majesty's Attorney General V Kuttapan UKEAT/0478/05/RN where Mr Justice Rimer held:

[3] As guidance to the relevant principles, we were referred to the Divisional Court's decision in A-G v Barker [2000] 2 FCR 1, [2000] 1 FLR 759, relating to an application for a civil proceedings order under s42 of the Supreme Court Act 1981, whose terms are similar to those of s 33. Lord Bingham of Cornhill, Lord Chief Justice, gave the leading judgment, with which Klevan J agreed, and pointed out that before the court can make an order under s 42 it must first be satisfied that the statutory precondition of an order is satisfied, its equivalent in the present case being that prescribed by s 33(1). If it is so satisfied, the court then has a discretion as to whether to make the order sought. Lord Bingham said, at p.764:

". .. Vexatious' is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible 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. Those conditions are in my view met in this case. Many of the proceedings show no justiciable complaint and, as has been pointed out, several writs have been issued against individual officers in the same department when one writ would have served against them all....

[5] Cases of allegedly vexatious litigants in ordinary civil litigation usually concern repeated claims or applications against the same defendant or defendants in respect of a particular matter by which the litigant has become obsessed. in the employment law field, what is more commonly seen is the making of repeated tribunal applications of a like type against different Respondents, the claims often following an unsuccessful job application. Section 33(1)(a) shows, however, that this difference is no bar to a case being made out under s 33.

[6] We were also referred to this tribunal's decision in A-G v Wheen [2000] IRLR 461. Mr Wheen had issued 13 separate applications, the Attorney General sought a restriction of proceedings order against him and this tribunal made the order. The following passages in Lindsay J's judgment are pertinent

"8.. Unlike the position in the Barker case, we have had no indication from him [Mr Wheen, who did not attend the hearing] that he will not launch proceedings in the future, nor any suggested mechanism (for example, that he would not launch proceedings unless he had previously received favourable advice from solicitors or counsel or something along those lines) that he might be willing to impose upon himself. We do not suggest that it would be reasonable to demand that from him or that it would have sufficed to avoid an order under s 33, but we do make the point that he offers nothing of any such kind at all as to his future conduct.

9 We have mentioned that many of his claims involve discrimination. Discrimination is generated or can often be generated merely by the personal characteristics of the individual concerned. It may fairly be said that for that reason facts justifying the launching of a claim for discrimination are more likely to recur to an individual than are, for example, the facts of an ordinary civil cause of action. Such a thought leads us to be particularly cautious in relation to section 33 and its application to discrimination cases. But 13 failed sets of proceedings as explained in Mr Lettrodt's affidavit do represent a substantial argument that there have been vexatious proceedings launched not upon reasonable grounds…"

27 In Zeb v Xerox (UK) Ltd UKEAT 0091/15 Mrs Justice Simler held

> The Employment Tribunal's power to strike out a claim at a preliminary stage is derived from Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That Rule enables a Tribunal to strike out a claim that has "no reasonable prospect of success". This power has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination. Cases in which a strike out can properly succeed before the full facts have been found are rare. As Lord Steyn explained in Anyanwu v South Bank Students' Union [2001] IRLR 305:
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> "24. … For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the 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 or demerits of its particular facts is a matter of high public interest. …"
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> In the same case at paragraph 37 Lord Hope made the following observations:
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> "37. I should like first to say that, if I had reached the view that nothing that the university is alleged to have done could as a matter of ordinary language be said to have aided the students' union to dismiss the appellants, I would not have been in favour of allowing the appeal. I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. …"

28 In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 in the Court of Appeal, Maurice Kay LJ said:

> "29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. … 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. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

29 In the case of Ahir v British Airways Plc [2017] EWCA Civ 1392 Underhill LJ said:

> “As I already said, in a case of this kind, where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to

advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced"

30 In the case of Van Rensberg v Royal Borough of Kingston Upon Thames UKEAT/0096/07, Elias J stated that a Tribunal has greater leeway when considering whether or not to order a deposit to make a provisional assessment of the credibility of a party's case.

Vexatious

31 I carefully considered the guidance of not striking out discrimination claims as an abuse of the process except in the most obvious and plainest cases.

32 When considering the application to strike out, the fact that the Claimant has presented 29 claims involving the same allegations against different recruitment agencies seemed a compelling starting point to strike out. However, whilst there were no details of the claims provided, the Claimant maintains that this claim was different from the others that he had decided to withdraw as this one is focused on the online application process as opposed to criticising a CV submission process. The Claimant also maintained that he has commuted long distances for work. Whilst I consider that the claim is misguided, given that these are matters of evidence that would need to be considered in full Tribunal, I do not strike out the claim on the basis that it is vexatious.

No reasonable prospects

33 When considering whether to strike out the claim on the basis that it has no reasonable prospect of success, I take a different view.

34 The Claimant was aware from the clear pronouncements in previous judgments issued to him in the claims that he has brought regarding the necessary requirements to establish complaints, in particular:

34.1 There needs to be a PCP; and

34.2 That PCP needs to place the Claimant at a substantial disadvantage when compared to non disabled persons.

35 I consider that it is plain and obvious that the Claimant will be unable to maintain that there was a PCP, of an online form, applied by the Respondent placed him at a substantial disadvantage. In particular:

35.1 There was no strict time frame or bar on seeking assistance in completing the online application form.

35.2 The contemporaneous correspondence shows that the Respondent was reasonably requesting from the Claimant what adjustments he needed to complete the online application. The Claimant did not respond to this but simply demanded an 'oral application' and

provided his telephone number. In effect, the Claimant seeks to establish that it is a reasonable adjustment for the Respondent to transcribe what he says and put it into the form themselves.

35.3 The Respondent will be able to establish that the Claimant had been able to complete online forms previously, as the Claimant accepts this.

35.4 The Claimant is not likely to establish that he would not have been able to ask his partner, a job centre, or advice centre for help in completing the form or that his disability prevented him from doing so. This position was explicitly rejected in his Defra case. It is incredible for the Claimant to maintain the same position. On the submissions before me the Claimant could have asked for assistance but chose not to.

35.5 The Claimant failed to provide any specifics to the Respondent of the actual difficulties of the online form had for him to the Respondent despite numerous invitations to do so; and

35.6 The Claimant's position is that he would have only sought to progress the application by way of oral application and this demonstrates a lack of reasonable cooperation in seeking the ameliorate the effects of any alleged PCP. The Claimant's single-minded demand for an oral application evidently disregarded the need for him to show that what he was being asked to do actually placed him at a substantial disadvantage.

36 Having considered Anyanwu, Ezsias and Ahir I consider that this is one of the rare cases where the exception against striking out discrimination cases applies. The number of claims that the Claimant has previously advanced relating to similar matters against different respondents, that have been dismissed or withdrawn on his own volition, is indicative of a lack of substance to those claims. There is a similar lack of substance in this claim and there is no credible basis to maintain this claim.

Employment Judge Burgher

14 May 2019