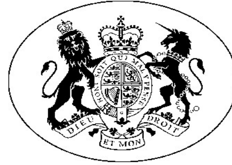

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr R Owen	and	R1 – Amec Foster Wheeler Group Limited R2 – Amec Foster Wheeler Energy Limited R3 – Wood Group UK Limited R4 – James Walker R5 – Andrew Barr R6 – Andrew Parsons R7 – Paul Wilson

Public Preliminary Hearing held at Reading on 24 September 2019

Representation **Claimant:** In person
Respondents: Miss D Sen Gupta QC, counsel

Employment Judge Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Victimisation – section 27 Equality Act 2010

2. The claim of victimisation has no reasonable prospect of success. The claim is dismissed.

Reasons – rule 62 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

3. This judgment was reserved and written reasons are attached.

Public access to Employment Tribunal Decisions

4. All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondents.

REASONS

Background

1. On 13 March 2016 the Claimant issued Employment Tribunal proceedings against the 2nd Respondent, and Mr Jim Shaughnessy, an employee of the 2nd Respondent, under claim no 3322658/2016 in respect of disability discrimination. After a full merits hearing on 12 to 16 December 2016, the claim was dismissed in a reserved Judgment with reasons issued on 27 January 2017. The Claimant subsequently appealed against the decision of the Employment Tribunal to the Employment Appeal Tribunal under number UKEAT/0210/17/BA. The EAT appeal was dismissed on 1 June 2018. The Claimant then appealed against the decision of the EAT to the Court of Appeal under number A2/2018/0867. The Court of Appeal dismissed the appeal on 14 May 2019.

2. The Claimant was originally employed by the 2nd Respondent. His employment transferred to the 1st Respondent on 1 April 2017. He is currently an employee of the 3rd Respondent. The 1st, 2nd and 3rd Respondents are associated companies. The 4th, 5th, 6th and 7th Respondents are employees of the 3rd Respondent.

3. On 24 December 2018, prior to the Court of Appeal decision, the Claimant issued a further claim of victimisation to the Employment Tribunal under claim number 3335592/2018 (the present claim). In this claim it is claimed that the proceedings referred to above (ET, EAT, Court of Appeal) amount to protected acts within the meaning of section 27(2)(a) of the Equality Act 2010. That is conceded by the Respondents and it is accepted by the Tribunal.

4. The Claimant claims that on or around 5 July 2018 he disclosed details of his current health condition to his line manager, Paul Wilson (7th Respondent), in confidence. He claims that the information disclosed to Mr Wilson was wholly unrelated to the health conditions which constituted the disabilities upon which he relied in respect of his claims for disability discrimination in the ongoing Court of Appeal proceedings. The Claimant says that he did not authorise the disclosure of his current health condition to anyone other than Mr Wilson.

5. The Claimant subsequently discovered, on or around 22 August 2018, that information regarding his current health condition had been incorporated into the skeleton argument of the 2nd Respondent in the ongoing Court of Appeal proceedings. Paragraph 6 of the skeleton argument included:

   "… On 5 July 2018 the First Respondent was informed that the Claimant is likely to need three sessions per week of kidney dialysis to take place in a hospital setting."

6. The Claimant claimed that his current health condition was of no relevance to the ongoing Court of Appeal proceedings and that he did not authorise the disclosure of this personal information to anyone other than Mr Wilson. He claimed that this was a breach of the General Data Protection Regulations 2016 in that his personal data was being used by the 2nd Respondent without his consent.

7. Accordingly, on 3 September 2018, the Claimant raised a formal grievance, via Mr Wilson, to be dealt with in accordance with under the 1st/2nd Respondent's formal grievance policy. The grievance read as follows:

   "From: owenroberts8@sky.com
   Sent: 03 September 2018 08:47
   To: Paul Wilson
   Subject: FORMAL GRIEVANCE 84310

   Sir,
   Following my initial approach to you with a grievance I would like to raise this as a formal grievance.

   I recently, as a courtesy, informed you, as my line manager, intimate details of my medical conditions. I of course understand that you are likely to inform others at Wood (Human Resources for example). However recent papers submitted to the Court of Appeal shows that what I disclosed to you has been divulged to third parties without my implicit or explicit consent. I view this as a breach of confidentiality and abuse of the Employee-Employer relationship.
   In my role at Wood I am reminded of the sensitivity of information that crosses my desk, I am sure all departments receive this advice regarding ethics.

   As such I would like to know who passed my information on to a third party and who told the third party they were allowed to publish these most intimate details.

   Regards

Robert Owen."

8. Following a chaser by the Claimant, Mr Wilson responded on 13 September 2018 as follows:

"From: Wilson, Paul
Sent: 13 September 2018 16:49
To: Owen, Robert
Cc: Williams, Claire; Gardiner, Rosy
Subject: RE: GRIEVANCE 3-SEPTEMBER-2018

Rob,

I acknowledge receipt of your e-mail below and apologise for the last response.

I have discussed this matter internally (the nature of such communication being legally privileged). Your grievance arises out of ongoing litigation in respect of an appeal that you have made to the Court of Appeal regarding the Employment Tribunal's decision following the Hearing in December 2016. It is therefore not appropriate for this matter to be dealt with as a grievance for me (or anyone else) to comment upon it. Both parties are represented in respect of this matter and it is only appropriate for me to state that you can ask your solicitor to raise this matter with our solicitor, if you feel that is necessary.

Therefore, contrary to my earlier email, I do not propose to take any further action in respect of this complaint for the reasons outlined above.

I am checking the details of the local Data Protection Office / Ambassador for the Reading Office and will advise you of these when I get them."

9. There were then several email exchanges regarding the matter between the Claimant and the 1st and 2nd Respondents and the Claimant's solicitor and the 2nd Respondent's solicitor. The Claimant was requesting disclosure of the identity of the person or persons who had disclosed the information regarding his current health condition.

10. On 16 September 2018 the Claimant issued a second grievance which included the following:

"Sir

I am formally initiating a NEW grievance.

On the 3rd September I initiated a grievance via my line manager Paul Wilson regarding breaches of my confidentiality and of I allege the Data Protection Act. Wood were late responding to me and when prompted told me that they were not continuing with the grievance and cited legal privilege. Further, a 3rd party solicitor representing Wood and James Shaughnessy in Tribunal proceedings wrote to my solicitor to ask me to desist in this grievance My major concern is that Paul Wilson and HR are implicated in the recent grievance and them cancelling it or curtailing it is beyond their remit, I believe I have a contractual right to a grievance procedure as laid out in company policy. Curtailing my rights because I am currently complaining (through the courts) about discrimination is nothing short of bullying as is the leaking of my personal personnel data, (and is also potentially a criminal act.)"

11. On 21 September 2018 the Respondent's solicitor sent a detailed response to the Claimant's solicitor responding to the Claimant's grievances.

12. Finally, on 24 December 2018, the Claimant issued this claim to the Employment Tribunal alleging that as at that date, the 2nd Respondent's solicitor had not responded to the Claimant's disclosure request nor had the 1st or 3rd Respondent permitted the Claimant to pursue his formal grievance.

Claim number 3335592/2018 - Victimisation

13. The Claimant claimed that one, some, or all of the seven Respondents had, because of his protected acts, subjected him to the following detriments amounting to victimisation under section 27 Equality Act 2010:

    (1) Disclosed details of the Claimant's current health condition without his consent;
    (2) Incorporated details of the Claimant's current heath condition in the Court of Appeal skeleton argument;
    (3) Failed to substantively respond to the Claimant's formal grievance within the specified seven day deadline;
    (4) Refused to permit the Claimant to raise a formal grievance in respect of the alleged unauthorised disclosure of personal information and potential GDPR breaches;
    (5) Refused to disclose the identity of those responsible for the alleged unauthorised disclosure of personal information and potential GDPR breaches.

Evidence

14. The Tribunal heard evidence on oath from the Claimant, Mr Robert Owen, and read his statement. He provided answers to questions asked in cross-

examination by the Respondents' Counsel and also made a closing submission.

15. The Tribunal also reads the Respondents' skeleton argument and heard oral submissions by the Respondents' Counsel.

Submissions

16. On 10 April 2019 the Respondent made a written application to strike out the Claimant's claim. A public preliminary hearing was requested to hear this application.

17. On 15 May 2019 the Claimant submitted a written response to the application and agreed that the matter should be considered at a public preliminary hearing.

18. During the course of the hearing, in the Claimant's statement, he made an application for the Respondents' ET3 response to be struck out on the basis that the Respondents had committed a criminal offence by breaching the General Data Protection Regulations and also because in paragraph 15 of the ET3 response form, it was stated:

"Given that the Claimant appeared to be making implausible assertions in the First Claim documentation, the Respondent sought disclosure of his medical records and associated documentation for the purposes of defending the First Claim. An Order for disclosure of that documentation was granted and the Claimant disclosed his medical records."

19. Accordingly, the Tribunal had before it an application by the Respondents to strike out the Claimant's claim and an application by the Claimant to strike out the Respondents' response. Each party resisted the other's application.

Striking Out – Relevant Law

20. Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Striking Out

(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 has been presented, as set out in rule 21 above

Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330

21. Where there are facts in dispute, it will only be very exceptionally that a case should be struck out without the evidence being tested.

Mechkarov v Citibank NA [2016] ICR 1121

22. It was stated that only the clearest cases should be struck out. Disputes of fact turning on oral evidence must have a hearing and the Claimant's case must be taken at its highest. If the case is conclusively disproved by or totally and inexplicably inconsistent with undisputed contemporaneous documents, it may be struck out. A tribunal should not conduct a mini trial to resolve core disputed facts.

Claimant's application to strike out of the response

23. The Claimant claimed that the response should be struck out because paragraph 15 of the ET3 response form (quoted above) was false and scandalous.

24. The Respondents responded by saying that the paragraph was brief but accurate. On 5 July 2016 Employment Judge Manley ordered Dr Sawyer (Healix Occupational Health) to disclose medical records. He complied with the order and produced the Claimant's medical records in his possession. The Claimant was not ordered to disclose medical records. Separately, the

Claimant disclosed his GP records on 18 September 2016. The Respondent did not have a hard copy of the order dated 5 July 2016 but read out the electronically available copy, the contents of which were not disputed by the Claimant.

25. The Tribunal accepted that paragraph 15, although brief, was factually accurate and there were no grounds to conclude that it was false or scandalous. There were no grounds to strike out the response.

26. This application was refused.

Respondents' application to strike out the Claimant's claim

27. The Respondent submitted that there was no reasonable prospect of success of the claim of victimisation because:

    (1) There was no detriment;
    (2) The acts alleged to be detriments were not done because of a protected act; and
    (3) The claim related to materials generated in the course of judicial proceedings and the Tribunal did not have jurisdiction over a claim that relies upon those materials by reason of judicial proceedings immunity.

28. The Claimant and the Respondents agreed that the Claimant had disclosed his current health condition to Mr Wilson on or around 5 July 2018. On or around 22 August 2018, that information was incorporated by the Respondents in a skeleton argument provided to the Court of Appeal. The Claimant presented written grievances on 2 September 2018 and 16 September 2018. The Respondent refused to deal with the grievances and refused to disclose the identity of those responsible for the alleged unauthorised disclosure of personal information.

29. All of these matters are the subject of undisputed documentary evidence which was put before the Tribunal. There were no core disputed facts.

30. The question for the Tribunal was whether the Claimant's claims of victimisation, based upon the above facts, had any reasonable prospect of success. If the Tribunal found that there was no reasonable prospect of success, it must go on to decide whether to exercise its discretion to strike out the claim.

Detriment

31. The Respondent referred to the following case authorities in respect of detriment:

    Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11
    The test for detriment is whether a reasonable worker would or might take the view that he had thereby been being disadvantaged in the circumstances in which he had thereafter to work.

    St Helen's Borough Council v Derbyshire & Others [2007] UKHL 16 –
    The detriment has to be treatment which a reasonable employee would or might consider detrimental. An unjustified sense of grievance cannot amount to detriment. There are some things that an employer might do during a discrimination claim which cannot sensibly be construed as a detriment or adverse treatment. Ordinary steps in defending the claim and ordinary attempts to settle or compromise the claim do no-one any harm and may even do some good.

    Deer v University of Oxford [2015] EWCA Civ 52 –
    The appellant would not be able to establish a detriment for a quite distinct reason, namely that the University was acting on legal advice and had acted reasonably in furtherance of its interests in the litigation. There is plenty of authority for the proposition that no reasonable employee could treat as a detriment ordinary and reasonable steps taken by the employer in the course of litigation.
    … In my judgment therefore it is fanciful to believe that this particular claim could succeed. The University was acting on the advice of lawyers. As the employment judge recognised, whether the advice was right or wrong, there was no basis for believing that the University had done anything other than rely upon the advice. Short of a submission that the lawyers were in some kind of dishonest collusion with the University, and that argument has properly not been advanced, the only proper inference is that the University was acting in what it perceived to be its best interests in the litigation.

    Abiola v North Yorkshire County Council & Others [2008] UKEAT/0369/08 –
    There was no detriment to an employee when the employer failed to give a substantive reply to a grievance letter in the course of ongoing litigation. The employer reasonably refrained from replying in case it prejudiced its position in the ongoing discrimination proceedings. The reason for the first Respondent's conduct was not that proceedings had been commenced but that the proceedings remained on foot and the first Respondent reasonably considered it might be prejudiced by giving a substantive reply and offering further assistance.

32. The Respondents submitted therefore, based upon the above case authorities, that ordinary and reasonable steps to protect an employer's position in ongoing litigation cannot constitute a detriment to an employee.

33. In this case, the Tribunal found that, as clearly established in the email correspondence between the parties from 2 September 2018 to 24 December 2018, the Respondents were protecting their position in ongoing litigation and acting on legal advice. That was the reason why the Respondents responded to the Claimant's grievance as they did, not because the Claimant had done the protected acts. There was no reasonable prospect of the Claimant succeeding in establishing that the five events (at paragraph 13 above), which were not disputed and were well-documented, amounted to detriments in view of the principles set out in the above case authorities.

Judicial Proceedings Immunity

34. This doctrine applies to materials generated in the course of judicial proceedings and the Tribunal does not have jurisdiction over a claim that relies upon such materials.

35. The Tribunal accepted that the doctrine applies to tribunal discrimination proceedings – Heath v Commissioner of Police for the Metropolis [2005] IRLR 270 including victimisation claims – Parmar v East Leicester Medical Practice [2011] IRLR 641.

36. In South London and Maudsley NHS Trust v Dathi [2007] UKEAT/0422/07/DA, paragraph 20 confirmed that employment tribunal proceedings are judicial proceedings which attract absolute immunity. Paragraph 26 referred to the rules relating to absolute immunity for legal proceedings restated by Devlin LJ in Lincoln v Daniels [1962] 1QB237, in which it was said:

    "The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories… the second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with a writ or other document which institutes the proceedings. … Since modern litigation requires the cards to be face up on the table, a skeleton argument, or something "akin to a pleading" in an employment tribunal is a necessary precursor to the presentation of argument or evidence under the point."

37. In this case, the Tribunal found that the disclosure of the Claimant's current health condition and the incorporation of those details into the Court of Appeal skeleton argument fell within the doctrine of judicial proceedings immunity in accordance with the principles set out in the above case law. The Tribunal does not have jurisdiction over the Claimant's claim that relies upon those matters.

Decision

38. The Tribunal found that in view of the above findings, the Claimant's claim of victimisation under section 27 Equality Act 2010, taken at its highest, has no reasonable prospect of success.

39. In the circumstances described above, and in the absence of any core disputed facts to resolve, the Tribunal considered it was appropriate to exercise its discretion to dismiss the claim.

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Employment Judge Vowles

Date: …6 November 2019…………..

Sent to the parties on:

……………………….. ....

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For the Tribunal Office