EMPLOYMENT TRIBUNALS

Claimant: **Mr C Bereanu**

Respondents: **(1) Wright Brothers Oyster House Limited**
(2) Petticoat Management Team Limited

Heard at: **East London Hearing Centre** **On: 25 September 2020**

Before: **Employment Judge O'Brien sitting alone**

Representation:

Claimant: In person (for the first part of the hearing and absent and unrepresented thereafter)

Respondents: Mr R Vincent of Counsel

JUDGMENT

The judgment of the Tribunal is that

1. **The claimant's application for the judge to recuse himself and/or for proceedings to be transferred to another region is refused.**

2. **The claimant's application to adjourn this hearing is refused.**

3. **The claimant's complaints against the second respondent of unfair dismissal, breach of contract, unauthorised deductions from wages, under the Working Time Regulations 1998 and any other complaints save for allegations of detriment on the grounds of protected disclosure and allegations of unlawful discrimination on the grounds of race are struck out.**

4. **A separate order is made in respect of the claimant's allegations of detriment on the grounds of protected disclosure and allegations of unlawful discrimination on the grounds of race against the second respondent.**

5. **The first respondent's application to strike out (or alternatively to order the payment of a deposit in respect of) each the claimant's claims against it is refused.**

REASONS

1 On 1 June 2020, the claimant presented a claim to the Employment Tribunal containing numerous complaints (unfair dismissal, whistleblowing detriment, race discrimination, notice pay, holiday pay, arrears of pay and other payments) against the respondents and against the Security Service. The claim against the Security Service was rejected by Employment Judge Russell on 1 July 2020. The claimant's application for reconsideration of that decision was refused by Judge Russell in a judgment and reasons sent to the parties on 2 September 2020.

2 The remaining two respondents resist the claims. They both argued in their Grounds of Resistance that the claims should be struck out and the second respondent accompanied their response with a written application to that effect. Consequently, this open preliminary hearing was listed to consider whether any complaint against either respondent should be struck out or made the subject of a deposit order.

Preliminary Issue – Application for Recusal and Transfer

3 Prior to the hearing, the claimant indicated to my clerk that he had brought a written application which he wished to be dealt with as a preliminary matter but refused at that time to provide any copies of the application. He did, however, hand copies to me and to Mr Vincent (Counsel today for both respondents) in the Tribunal room. It was an application for me to recuse myself and for the matter to be transferred to another region.

4 With the agreement of all of the parties, I dealt with that application after giving Mr Vincent a short time to read the claimant's written submission.

5 It is the claimant's position in essence that the East London Employment Tribunal, as an organisation, is seeking to obstruct his claim, and that no judge sitting in the region is willing or able to dispose fairly of his claim. His claim concerns alleged accounting irregularities which, he asserts, facilitate money laundering, tax evasion and other serious crimes (involving, to use the claimant's term, 'Black money'). It is the claimant's assertion that the Tribunal has been infiltrated or is being directed by the Security Service (colloquially known as 'MI5') to further its aim of covering up these crimes.

6 The basis upon which the claimant makes these allegations is set out in his 4-page written application, a copy of which I placed on file. I took the entirety of that document into account and allowed the claimant to develop his application orally. Whilst he disagreed with my analysis, it appeared to me that the matters he principally relied on as evidence of bias were: the Tribunal's failure to send a copy of his claim form to a regulator relevant to his whistleblowing claim; Judge Russell's refusal to accept his claim against MI5; the Tribunal replacing the claimant's 25-page 'Background of Claim' document with unreadable scanned copies and sending the latter to the respondents; Judge Russell undertaking the reconsideration of her own decision; and the Tribunal delayed in registering the claimant's claim, thus giving the respondents greater time to prepare their respective responses.

7 I asked the claimant for further evidence of the Tribunal's and/or my bias but he merely referred to his written application. He indicated some doubt that he would receive a fair trial even in another Employment Tribunal region, but was of the view that a transfer was worth trying. My reassurance that all judges were bound by their judicial oath to decide cases independently and free from external influence was unpersuasive to the claimant. On the contrary, when I explained that, whilst I sat from time to time as an employment judge, I was a salaried judge of the First-tier Tribunal (Immigration and Asylum Chamber) that merely made the claimant more convinced that I was somehow under the sway of the Home Office.

8 The respondents objected to the matter being transferred or to me recusing myself. Mr Vincent submitted that there was no proper basis to conclude that the organisation of the East London Employment Tribunal was seeking to obstruct the just deposal of this case, or that the judiciary was biased or even appeared to be biased.

9 It appeared to me that the claimant was alleging actual bias. However, his written application refers to **Porter v Magill [2002] 2 AC 357** and so I treat his application as alleging apparent bias in the alternative.

10 In the latter regard, the House of Lords in **Porter v Magill** approved the following test formulated in **Re Medicaments and related Classes of Goods (No.2) [2001] 1 W.L.R. 700**:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased."

11 The fair-minded observer is not unduly sensitive or suspicious (**Helow v Secretary of State for the Home Department [2008] 1 WLR 2416**). Where there are real grounds for doubt as to a lack of bias, it should be resolved in favour of recusal. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions (**Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451** at paragraphs 21 to 25.)

12 None of the matters raised by the claimant in his application and oral submissions could on any reasonable analysis raise even the possibility of institutional or individual bias. In respect of each of the main issues identified above:

12.1 The Tribunal's failure to send a copy of his claim form to a regulator relevant to his whistleblowing claim. Box 10.1 of the ET1 reads:

> If your claim consists of, or includes, a claim that you are making a protected disclosure under the Employment Rights Act 1996 (otherwise known as a 'whistleblowing' claim), please tick the box if you want a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator (known as a 'prescribed person' under the relevant legislation) by tribunal staff. (see guidance)'

12.2 The relevant section of the guidance ('Making a claim to an Employment Tribunal') states:

Public Interest Disclosure claims

If your claim consists of, or includes, a claim that you have made a protected disclosure under the Employment Rights Act 1996 (also known as 'whistleblowing'), we will copy your claim form or extracts from it to the relevant regulator if you give consent by ticking the box at 10.1 of the ET1 claim form. We will then write to you or your representative if you have one advising which regulator your claim has been referred too. We will also write to the respondent explaining what we have done. It will be for the regulator to decide whether the underlying issue contained in the claim form requires investigation.

We will not forward your claim unless box 10.1 is ticked even if reference is made within the body of the claim form.

Your claim can only be referred to a prescribed regulator as detailed in guidance which can be found on the following link:

https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2. It would be helpful if you identify the name of the regulator you wish your claim to be referred to within your claim form.

This will not affect in any way how we process your claim. Your claim to the Employment Tribunal will continue whether or not the claim is referred to regulator, unless you are informed otherwise.

12.3 I accept the claimant's claim not to have been notified that his claim had been forwarded to any prescribed regulator and so infer that it had not been forwarded to any. However, I am unable to accept that failure as evidence of nefarious actions contrary to the claimant's interests. The claim was submitted relatively early in the Covid-19 pandemic when Tribunal was coming to terms with entirely new ways of working and resources were also stretched. Furthermore, the claim form does not make clear which regulator should have been sent a copy. It would have been a different matter altogether if the Tribunal had falsely notified the claimant that relevant regulators had been sent copies of the claim form when they had not. As it is, it remained open to the claimant to identify and inform any relevant regulator himself.

12.4 Judge Russell's refusal to accept his claim against MI5. I have read Judge Russel's judgment on reconsideration of her refusal to accept the claimant's claim against MI5. I am in entire agreement with her decision and the reasons she has set out clearly in her judgment. The Tribunal is a creature of statute and has jurisdiction only to the extent granted in legislation. It has no jurisdiction to hear any of the claimant's complaints against MI5.

12.5 The Tribunal replacing the claimant's 25-page 'Background of Claim' document with unreadable scanned copies and sending the latter to the respondents. It is unfortunate that one of the respondents received a poorly

reproduced copy of the claimant's Background of Claim; however, I note that the respondents were able to provide in their bundle from today a full and legible copy of the document in question and so am satisfied that deliberate attempt has been made to limit distribution of the details of the claimant's claim.

12.6 Judge Russell undertaking the reconsideration of her own decision. It is a requirement of the 2013 Procedure Rules that reconsideration shall where practicable be undertaken by the judge who made the original decision.

12.7 The Tribunal delayed in registering the claimant's claim, thus giving the respondents greater time to prepare their respective responses. First, I observe again the fact that the claim was submitted at a time when the Tribunal's operations were severely disrupted. In any event, a delay in sending a copy of the claim documentation to the respondents afforded the latter no advantage whatsoever.

13 None of the matters raised by the claimant in his application, either individually or cumulatively, indicate any attempt by the Tribunal to hamper the claim or effect a cover up of the matters raised within it. Nor do they provide even the slightest grounds to find that any judge hitherto dealing with the claim has exhibited bias against the claimant. As for myself, whilst I recognise that the claimant might find it impossible to accept, I am not an agent of nor under the influence of MI5 or any other organ of the state and have approached this case independently and impartially in accordance with my judicial oath.

14 As for the appearance of bias, there is simply nothing before me which would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the tribunal was biased.

15 Consequently, I refused to recuse myself and refused to transfer this matter out of the London East region.

Preliminary Issue – Application to Adjourn

16 The claimant then indicated that he wished to appeal against my decision, and also that he was in the process of appealing against the reconsideration decision of Judge Russell. I treated these representations as an application to adjourn this PH pending the outcome of those appeals. The application was opposed by the respondents.

17 I refused the application for the following reasons. The respondents had attended today ready to deal with the issues at hand. They had spent time and had incurred cost in preparing and securing representation for and attending the hearing. Much of this time and expense would be wasted if an adjournment were granted. There would also be a significant delay to proceedings. Conversely, refusing the application would cause no prejudice to the claimant. In my judgment he has no reasonable prospects of successfully appealing against my decision or the reconsideration decision of Judge Russell. In any event, the question of whether his claim against MI5 should be accepted had no bearing on my decision today whether to strike out his claims against the remaining respondent or order a deposit in respect of any of those allegations).

18 Having reached the point at which I could deal with the substantive issues in this PH, the claimant announced that he would not take any further part in proceedings but

would instead leave. I tried hard to persuade him to remain. I explained that his leaving would not force me to adjourn proceedings, as I had been given no good reason why he could not further participate. I also made clear that I would be assisted in my decision by any representations he made, and also, in the context of any possible deposit order, some evidence from the claimant about his means. I explained to him the potential consequences of a deposit order beyond merely having to pay a sum of money in order to continue with the allegation or allegations in question. I made clear that I would, however, make any decisions without his input if he chose to leave. The claimant left nevertheless and I continued in his absence.

The Substantive Issues – the Respondents' Application to Strike Out

19 I heard from Mr Vincent first in respect of the second respondent. He submitted that the crux of the claimant's claims was that he made certain complaints to Matthew Wood, an employee of the first respondent, who then retaliated against him. Even if the claimant succeeded in establishing those facts, there was no basis on which it could be found that the second respondent had acted unlawfully. The second respondent was a payroll management service merely acting on the first respondent's instructions. Consequently, the claims against the second respondent had no reasonable prospects of success.

20 Further or alternatively, the claims were vexatious and abusive. The amount claimed was wildly disproportionate to any loss or damage suffered. The allegations made by the claimant were gratuitous, scandalous and harassing. The claim as a whole was so abusive that it was inappropriate even to try to identify any individual well-founded complaints within it. Too much of the respondents' and the Tribunal's time had already been wasted by the claimant. He had made similar misconceived claims before and was clearly a vexatious litigant.

21 In respect of the first respondent, Mr Vincent accepted that the claim might contain legally well-founded complaints but that it was so abusive that it was appropriate to strike the whole claim out nevertheless.

22 Mr Vincent invited me to order a deposit in respect of any allegation not struck out.

23 Pursuant to rule 37(1) of the 2013 Rules of Procedure, the Tribunal may strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospects of success.

24 I remind myself that striking out a claim is a draconian measure which should only be used in the most clear-cut of cases. Striking out for misconduct should rarely be done whilst a fair hearing remains possible. Discrimination and whistleblowing cases involve an examination of the reasons behind certain actions by people who rarely admit even to themselves any improper motive. In short, it is rarely appropriate to strike out discrimination or whistleblowing allegations save where they could not succeed even if the claimant established all the facts in issue.

25 Pursuant to rule 39, the Tribunal may make an order requiring the payment of a deposit not exceeding £1,000 in respect of any allegation it considers has little reasonable prospects of success. The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to that information when deciding the

amount to order. If the paying party fails to pay the deposit by the time specified, the allegation in question shall be struck out.

26 When setting the level of a deposit, I should make it such that it causes the paying party to reflect on the strength of the allegation in question without making it so high that it is in effect a strike out order.

27 The claimant's claim is lengthy and complex but the core is this: he was subject to unlawful employment and accounting practices applied by the respondents to migrant temporary legal workers and was subjected to detriments and dismissed after he complained about those practices. As identified above, these are complaints of unfair dismissal (for making a protected disclosure), whistleblowing detriment, race discrimination (treatment less favourable than British workers in otherwise identical circumstances), failure to pay notice pay, holiday pay, arrears of pay and other money claims.

28 The claimant does not in his Background of Claim document clearly distinguish between the respondents when making these claims. However, he does accept in his recusal and transfer application that the second respondent is not his employer. It follows that he has no legal basis to bring an unfair dismissal complaint against the second respondent (irrespective of what factual allegations are eventually found against that organisation) and so I strike out that complaint. Similarly, the claimant has no legal basis to make a claim in the Employment Tribunal against the second respondent for damages for breach of contract, unauthorised deductions from wages, or any complaint under the Working Time Regulations 1998.

29 As for the claimant's complaints of whistleblowing detriment and race discrimination, Mr Vincent accepted that the second respondent was acting as the first respondent's agent in its dealings with the claimant. Consequently, the claimant does have a legal basis for bringing such claims against the second respondent (pursuant to s47B(1A)(b) of the Employment Rights Act 1996 and s110(1) of the Equality Act 2010 respectively). Whether the second respondent was aware of the alleged protected disclosures and whether any act attributed (in whole or in part) to the second respondent was materially influenced by the protected disclosure and/or the claimant's nationality is a question of fact. Consequentially, I refuse to strike the remaining allegations as having no reasonable prospects of success.

30 As for questions of vexatiousness and abuse of process, I make the following findings. It appeared to me that the claimant genuinely believed the allegations he made. It is not necessary for me to determine finally that point today; however, I was not persuaded that he was seeking to abuse the process of the Tribunal by bringing these claims. The fact that the sums claimed appear to be well beyond any likely award is something the respondents have demonstrated that they are well able to deal with, even if they lose on liability. The claimant has made some wide-ranging allegations of criminality; however, these need only be addressed to the extent necessary to deal with the claims for which the Tribunal has jurisdiction. Again, the respondents are professionally represented and have demonstrated a clear awareness of the ambit of this Tribunal's jurisdiction.

31 It is said that the claimant has 'form' for making this type of claim. I was provided with the judgment of the London Central Employment Tribunal, regarding a claim which bears significant similarities to this one. However, to quote Aristotle, 'One swallow a

summer does not make, nor one fine day.' Similarly, one repeat claim does not make a vexatious or serial litigant.

32 Consequently, I do not strike out the remaining claims against the second respondent on the grounds of unreasonableness or vexatiousness. I do, however, consider that it would be appropriate to make deposit orders in respect of (1) any and all allegations of whistleblowing detriment and (2) any and all allegations of race discrimination, for reasons I give below.

33 As for the claims against the first respondent, the only basis upon which it is said I should strike them out is the claimant's unreasonable and/or vexatious behaviour, regardless of any arguable merit. I am far from persuaded that that would be appropriate for the reasons given above. Neither do I consider it appropriate to make a deposit order. I stress, however, that I make no findings which might bind a future Tribunal, for instance should an application be made for costs following a full merits hearing.

Reasons for Deposit Order

34 As required by rule 39, I now set out the reasons why I consider that the claimant's complains of whistleblowing detriment and race discrimination against the second respondent have little reasonable prospects of success.

35 The second respondent is the first respondent's payroll management service. The second respondent's pleaded case, that it does not have any management or financial decision making powers on behalf of its clients and does not have authority to make decisions on amounts paid (see paragraph 3 of its grounds of resistance) is very likely to be established at a full merits hearing. Moreover, it is entirely unclear how the claimant will establish that the second respondent was aware of any protected disclosure made by him such that it could influence any actions of the second respondent let alone that any protected disclosure and/or his nationality did in fact materially influence the second respondent's actions.

36 Turning to the amount of the deposit, I consider it appropriate to order the payment of a deposit in respect of (1) the whistleblowing detriment allegations and a separate deposit in respect of the (2) the race discrimination allegations. The significance and operation of deposit orders was explained to the claimant and yet he chose to absent himself and provide no evidence of his means. Consequently, it is difficult to know how high to set the amount to cause him to reflect on the merits of his case whilst not acting as an absolute barrier to his continuing with any claims he would otherwise choose to.

37 I do, however, know that the claimant was a temporary migrant legal worker, that he claimed in his ET1 to be working a 47-hour week on an hourly rate of around £12-£12.50, and he did say today that he is living in shared accommodation. Doing my best with this limited information about his income or income potential and possible outgoings, I set the level of each deposit at £100.

38 Consequently, any and all allegations against the second respondent of detriment on the grounds of protected disclosure will be struck out unless the claimant pays a deposit of £100. Further, any and all allegations of unlawful discrimination on the grounds of race against the second respondent will be struck out unless the claimant pays a separate deposit of £100. I shall give the claimant 28 days from the date of the deposit order to make these payments.

39 This case should be listed for a case management preliminary hearing with a time estimate of 2 hours on the first available date after **4 December 2020**.

Employment Judge O'Brien
Date: 27 October 2020