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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Quarm**

Respondent: **The Commissioner of Police for the Metropolis**

Heard at: **East London Hearing Centre**

On: **8 February 2021**

Before: **Employment Judge Burgher**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr N de Silva (Counsel)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The Claimant's claims are struck out

REASONS

1. The matter was listed before me to consider striking out or ordering a deposit as a condition for the Claimant to proceed with his claims.

2. I was referred to relevant pages in a bundle of 123 pages. Mr de Silva had prepared a 7 page skeleton argument that had been exchanged and he developed the points in oral submissions. The Claimant provided full oral submissions and helpfully clarified the elements of his case for me to properly consider.

3. The relevant background is as follows.

4. The Claimant is black African. He presented his complaint to the Tribunal on 26 September 2020 having contacted ACAS on 31 August 2020.

5. The Claimant's claims were clarified before me as detriment arising from protected disclosure pursuant to section 47 of the Employment Rights Act 1996 and unlawful victimisation contrary to section 27 of the Equality Act 2010. It was clarified before me that the Claimant was not bringing a claim of direct race discrimination contrary to section 13 Equality Act 2010 in this claim.

6. The Claimant has apparently brought 15 previous complaints to Employment Tribunals arising from his long service with the Metropolitan Police Service.

7. In July 2015 the Claimant was unsuccessful in his claim number 3246903/ 2013 against the Respondent and the Employment Tribunal in that case awarded the Claimant to pay £18,000 in respect of the Respondent's legal costs. Following this costs order the Respondent obtained a charge over the Claimant's property which was duly registered on 26 October 2018. The Claimant had also separately agreed to pay the costs instalments and I understand that between 2018 and 2019 the Claimant paid about £1400 of the debt.

8. The charging order that the Respondent obtained did not provide any indication as to when it was to be removed. The Claimant understood that his monthly repayments of the costs would continue until he settled the total debt.

9. On 26 February 2020 the Claimant through his mortgage broker was able to secure a more attractive mortgage with the Halifax/ Bank of Scotland. It was intended that this would have led to increased borrowing to enabled him to discharge a number of his outstanding credit card and loan balances. The Claimant also had debt in relation to the freeholder in respect of the service charge of his property. Unsurprisingly, as a condition of the mortgage offer that the Claimant was required to discharge his outstanding debts. The Claimant believed that this mortgage offer would allow him to repay the Respondent's costs much quicker to allow the charging order removed from the title deed.

10. In order to secure the new mortgage the Claimant required a deed postponement from the Respondent which would temporarily suspend the Respondent's interest in the title deed to his property.

11. By letter dated 31 March 2020 the lawyers of the Halifax/Bank of Scotland wrote to the Respondent seeking consent for the deed postponement. Consent for the deed postponement was not forthcoming.

12. The Claimant therefore wrote to the Respondent Ms Sara Royan asking for deed postponement of the issued, He states in ET1 that between 14 March and 5 May the Respondent’s staff directed matters to solicitors to deal with the consent for the deed of postponement. The Claimant was concerned by this as the solicitors concerned, Capsticks, had been exclusively dealing with the ongoing litigation that he had in respect of his outstanding cases against the Respondent. He believed that

the withholding of consent was in some way retaliation and detriment in respect of his ongoing and past claims.

13. No deed postponement was issued and on 29 April 2020 the Claimant wrote to Ms Sara Royan in the Respondent's Directorate of Legal Services. He asked for the deed postponement to be processed and indicated that if there was an undue delay in the provision of the deed postponement it is likely that the time limit on his new mortgage offer would expire and he would suffer unnecessary costs and profound financial hardship. He stated that he would bill these costs directly to the Respondent and that he would view the undue delay the provision of the deed postponement as an act of victimisation due to his three ongoing ET cases against the Respondent.

14. Correspondence ensued between Capsticks and the Claimant between 11 May and 24 June 2020. These were in the bundle and I carefully reviewed these emails and letters.

15. By 27 May 2020 Capsticks stated that the Respondent would agree to a deed postponement provided that the Claimant agreed to have transfer the sum of £16,023.90 to it. This was the specific amount the Claimant stated in his previous letter of 20 May 2020 as amount of the additional borrowing secured to enable all of his debts to be paid off, including the Respondent's debt.

16. Separately, the Claimant applied to the Employment Tribunal for an amendment to his existing claims by letter dated 28 May 2020. He wished to include a claim for detriment in respect of delay in consenting to the deed or postponement. On 3 July 2020 Employment Judge Crosfill refused the amendment stating at paragraph 10 of his order:

> *The proposed new paragraphs 51 to 57 do introduce a new claim relying from a detriment said to have been inflicted between 28 April to 28 May 2020. As such, if the Claimant issued a new claim today it would be presented in time. On its face the claim cannot be said to have no prospects of success although it may face difficulties.*

17. Before me, the Claimant clarified that in subsequent correspondence he was telling the Respondent he could not afford to pay off the amount £16,023.90 as he had credit cards and loans to pay off. Further correspondence was sent and reviewed ensued relating the Claimant's financial position and on the 17 June 2019 the Claimant was informed that the deed of postponement would be granted without condition. The deed was then on 24 June 2019.

18. Apparently this was not issued quickly enough for the Claimant to benefit from favourable mortgage terms that had been offered and this has led to further financial difficulties for him.

19. The Claimant maintains that he was subjected to detriment by the Respondent the consequences of which led to the mortgage providers withdrawing their attractive mortgage offer leading him to have to get lesser terms.

20. The key allegations in this claim relate to the Claimant having his deed postponement delayed and been asked to 'commit mortgage fraud' by asking his mortgage provider to provide more money to him than he could actually afford. The Claimant believes that key personnel in the Respondent's directorate, who have been named in his ongoing Tribunal cases must have been involved in giving instructions to Capsticks in relation delaying his deed postponement and the reason doing this was because of his previous claims discrimination and whistleblowing.

Law

21. The relevant provisions of the 2013 Employment Tribunal rules are as follows:

> Strike Out
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> 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party,
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> a Tribunal may strike out all or part of a claim or response on any of the following grounds—
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> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
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> (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;
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> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
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> (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).
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> (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.
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> (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.
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> Deposit
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> 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.
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> (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.

22. In Zeb v Xerox (UK) Ltd UKEAT 0091/15 Simler J gave a summary of the relevant application of the legislation.

> 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. …"

In the same case at paragraph 37 Lord Hope made the following observations:

> "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. …"

23. 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."

24. Mr de Silva referred to the case of Ukegheson v London Borough of Haringey [2015] ICR 1285 EAT. Langstaff J, as he then was stated at paragraph 23

> The purpose, as it seems to me, of the provision of the strike-out rule is twofold. In an appropriate case it serves to avoid the exposure of a Respondent to unnecessary expense. A Respondent may not be able to recover its costs of defending a labyrinthine, detailed, lengthy claim, which may be ill-formulated and which may take several days of hearing brought by a party who, if they lose, will have no substantial assets with which to pay any award of costs to which the Respondent might otherwise be entitled under the costs provisions in the Rules. However, its other and central purpose is to provide for straightforward and obvious cases where, on any showing, there is no prospect in reality of success (other than perhaps a fanciful one) to be removed from consideration and in that way preserve the resources of the court and the parties and ensure that other cases have a better chance of being heard promptly before the Tribunal. It can thus serve a very important function, but it is important to keep it in its proper place. There is no room, as indeed was observed in ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51, for the proceedings to become something of a mini-trial, as the suggestion of finding facts begins to imply.

25. 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"

26. 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 parties case.

27. When considering the amount of a deposit the case of Hemdan v Ishmail [2017] ICR 486, EAT Simler J stated

> *"the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails…the purpose is emphatically not…to make it difficult to access justice or to effect a strike out through the back door". (para. 10-11)*
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> *"Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued" (para. 16)*

Conclusion

28. I considered the relevant chronology and allegations advanced and had regard to the general structure against striking out cases of unlawful victimisation and whistleblowing case on public policy grounds and ensuring I take the Claimant's case at its highest. I conclude that this is one of the straightforward and obvious cases where, on any showing, there is no prospect in reality of success (other than perhaps a fanciful one).

29. On the pleaded case the Claimant would have to show that the basis of the delay in offering a deed of postponement was because of his protected acts and/or protected disclosures. A mere assertion is insufficient.

30. First, the alleged detriment arose directly from the Claimant's application for a new mortgage. There was limited factual dispute. The correspondence speaks for itself. From a proper reading of the correspondence it is evident that the delay in agreeing to a deed of postponement was the Respondent's desire to ensure that the costs debt would not be jeopardised and was asking the Claimant questions in this regard. Once these questions were answered and clarifications given the

Respondent agreed to the deed of postponement. There was clear communication relating to the way in which the Respondent could secure its financial interests and it was clearly responding to the information that the Claimant was provided to it. The Claimant's suggestion that this correspondence was led by directors who are involved in litigation has no reasonable prospect of success, especially given the fact that the deed postponement was subsequently granted.

31. Further, despite the Claimant's submissions to the contrary, there is nothing in the Respondent's correspondence indicating that the Claimant should commit mortgage fraud. Whilst the Claimant alleges this in his correspondence it is fanciful for him to do so on proper reading.

32. Finally I also conclude that the chronology in relation to the timing of his claim means the Claimant has no reasonable prospect of establishing that his claims have been bought within time or that it is just and equitable to extend time. The Claimant is very experienced in Tribunal litigation and he had these claims rejected as an amendment application with an indication of when the claim should be brought by Employment Judge Crosfill. Yet he did not go to the ACAS until 30 August 2020 or bring his Claimant of 26 September 2020.

33. The Claimant indicated that he was concerned about the delay in the deed postponement in his letter of 29 April 2020 and his amendment application on 28 May 2020. The Claimant's assertion that his claim crystallised on 24 June 2020, when he was given the deed of postponement has no reasonable prospect of success as this is the date of a non-detrimental act for him, the date he was given the deed of postponement.

34. In these circumstances I conclude that the Claimant's claim in this matter has no reasonable prospect of success and it is struck out.

Employment Judge Burgher

15 February 2021