EMPLOYMENT TRIBUNALS

Claimant: Mr A. Neary

Respondent: East Riding of Yorkshire Council

PUBLIC PRELIMINARY HEARING

Heard by CVP **On: 5 November 2020**

Before: Employment Judge Rogerson

Appearances
For the claimant: in person
For the respondent: Mr. Bruce Frew (counsel)

RESERVED JUDGMENT

The claim is struck out. The claimant is ordered to pay the respondent costs in the sum of £1,500.

REASONS

1. In these reasons, I will firstly deal with the claimant's failure to attend the substantive hearing and the background to the claim, then the respondent's applications for strike out of the claim and a costs order.

Claimant's Failure to attend the Substantive Hearing

2. The substantive hearing of this claim was listed to take place at 10.00 am on 14 September 2020 at Hull Employment Tribunal. Both parties had received the notice of hearing, confirming it was attended, the venue and start time of the hearing. The respondent's witnesses and counsel attended at 10am, the claimant did not attend.
3. Attempts were made to contact the claimant by email and telephone. 3 telephone calls were made leaving voicemail messages and an email was sent to the claimant. The email confirmed that the hearing was an attended hearing and that because of the claimant's failure to attend at 10am, the start would be delayed until 1pm, to allow the claimant time to attend the hearing and to contact the Tribunal.
4. The claimant did not contact the Tribunal and he did not attend at 1pm. The respondent made oral applications to strike out of the claim and for costs. The

Tribunal decided that those applications could not be dealt with without giving the claimant the opportunity to make representations.

5. Case management orders were made requiring the respondent, by 2 October 2020, to provide the claimant (and Tribunal) with the strike out and costs application in writing, setting out the grounds relied upon and a breakdown of the costs claimed. The claimant was required by 16 October 2020, to provide the respondent (and Tribunal) with his written response to those applications together with any information about his means (capital/ income/expenditure) that he wanted the Tribunal to consider. A remote hearing by CVP was listed to take place on 5 November 2020 to decide both applications.
6. These orders were made to ensure fairness to both parties enabling the parties to provide each other (and the Tribunal) with all the relevant information before the hearing so that neither party was disadvantaged. The claimant confirmed that he understood the orders made what he was required to do and why the orders had been made.
7. On 1 October 2020, the respondent complied with the order made, by providing the claimant with the written application for strike out and costs, which set out the applicable rules of procedure, the grounds and the evidence relied upon to support the applications. A breakdown of the costs claimed was also provided explaining how those costs had been calculated.
8. The claimant failed to comply with the order made and did not provide the respondent with any written response to the strike out or costs application or any information about his 'ability to pay'. The claimant offers no explanation for his failure to comply. At this hearing, the limited relevant representations the claimant made are set out in these reasons. I have also included any emails sent by the claimant (as they have been written) that appear to be relevant to the applications made by the respondent. Pausing there, it is clear from the content of the emails the claimant sends and the oral representations made at this hearing, that despite any judicial direction, the claimant prefers to repeat the gratuitous offence he directs at the judiciary instead of engaging with the issues that arise out of the applications made. I have ignored the offensive content and have considered the discernible relevant oral representations that are made in response to the respondent's representations.
9. The claimant sent an email at 7.30 am on the morning of this hearing, which to very limited extent refers to the applications made. The email states:

*"**It is my intention,** though unless a miracle happens and a clone of the excellent HHJ Penelope Belcher of the Admin Court in Leeds turns up at the ET today I will be shut down, condescended to, spoken over, sneered at while the respondent and the EJ will indulge in a mutual sycophancy-fest, **to resist both the strike out and the costs order the respondent has applied for**.*

In short (and ALL of this has been said before... but EJs and REJs don't hear/read what is inconvenient... bored and boring as they are...)

*The case should have its clock reset to Feb/March 2020 immediately. I was not provided with a copy of the ET3 at least the statutory 7 days before the PH. I brought this, politely and correctly, to the attention of EJ Thunderbird Brain. Strangely he went deaf. Even more strangely, the promised 'automatic recording' of the telephone PH has mysteriously disappeared.... I wonder who might have had it accidentally deleted? Here's looking at you REJ Robertson... I DO believe in karma and even you will eventually be brought low REJ! Barrister 'I'll have VAT with that' Frew's response to my request for an adjournment as I'd not had my procedural (ET Rules of Procedure 2013 Rule?) entitlement to prepare myself was to demand he be paid an **'extra day's fees plus VAT'** should his mate, EJ Brain, acquiesce to my perfectly lawful and polite request.!*

I applied at the PH for the case to be anonymised. EJ Thunderbird Brain batted the application away. He 'erred in law'. ie He was uninterested and clueless! I have since protested this point. EJ Susan Judith Chalmers, Cold wet flannels on forehead needing, out of tribunal mid-sentence flouncing, Equality Act 2010 Sect 26 and 27 ignoring, lecturing on the correct use of the common adjective, claimant's companion singling out and belittling, renowned misandrist Cox batted that protest away too - though frankly how she had the chutzpah to even think she could get involved in this case too is beyond me...but indicative of the broader EJ mindset i.e we are unsackable/'the law doesn't apply to us' and 'our excreta are inodorous'... (highlighted text is my emphasis)

Background to the Claim

10. The background to this claim is provided using the written record of the preliminary hearing that took place on 7 April 2020, before Employment Judge Brain. The record of that hearing was sent to the parties on 14 April 2020.
11. By a claim form presented on 19 February 2020, the claimant alleged discrimination and victimisation arising out of an application he made for employment with the respondent in the post of a supply maths teacher. The claimant submitted his application for the post on 17 July 2019. On 23 October 2019, he was offered an interview to take place on 6 November 2019. On 25 October 2019, the offer of the interview was withdrawn.
12. Just pausing there, it is important to note these complaints arise out of one alleged act, the decision made on 25 October 2019 to withdraw the offer of an interview. There is no prior history or other event/interaction between the claimant and the respondent from which the claimant seeks to draw any adverse inference to support a finding of discrimination/victimisation in relation to that alleged act.
13. At paragraphs 6-11, Employment Judge Brain records how the claimant's case of discrimination and victimisation is put (highlighted text my emphasis):

> "6. *The claimant's case is that he is a* ***disabled person upon the basis that he has been diagnosed as HIV positive****, a disability for the purposes of the Equality Act 2010.*
> *7.The claimants case of disability discrimination is brought on the basis that he made a declaration in the application form that he has a disability.* ***There was no provision within the application process for him to give further details, other than to say that he was, at the material time, disabled. The respondent's position is that the claimant was offered an interview having declared his disability status upon the application form. The reason for withdrawing the offer of interview was because of the inability to obtain a suitable reference and not because he said that he has a disability.***
> *8.The claimant's case is that an applicant for the position with the same level of experience but without a disability would have been offered an interview.* ***The claimant will appreciate that the burden is upon him to show a prima facie case that he was less favourably treated than someone else in similar circumstances would have been treated and that it was the fact of his disability which was a material reason the respondent's decision to withdraw the offer of interview***
> *9.The claimant had also disclosed his age upon his application form. Again, the offer of interview was made following that disclosure.* ***The claimant's case is that a comparator in the same or in similar***

circumstances to him but of a younger age or in a younger age group would have been offered an interview.
10.For the victimisation complaint ***the 'protected act' was a previous claim made in the Employment Tribunal against Leeds City Council*** *arising out of the claimant's employment with that Council at Bruntcliffe School(BS). These proceedings commenced on 18 January 2015. The claimant informed the tribunal that the hearing of the case took place in March 2016 in the Leeds Employment Tribunal. The matter is currently before the Employment Appeal Tribunal.* ***The claimants case in this matter, is that the respondent subjected him to the detriment of the withdrawal of the offer of interview because he had issued proceedings against Leeds City Council in the Employment Tribunal complaining of a breach of the 2010 Act.***

14. The complaints and issues were identified and clarified for each of the complaints made, so that the claimant knew what he was required to prove, to establish liability. Case management orders were made for the disclosure of documents and for witness statements to be prepared so that all the evidence relied upon was available to the parties before the hearing. Having previously brought proceedings the claimant is familiar with the Employment Tribunal process. He has received notices of hearings and attended hearings previously when notices of hearing have been issued.
15. The claimant was sent the notice of the substantive hearing for this claim which confirmed that he was attended hearing would take place at Hull Employment Tribunal at 10 AM on 14 September 2020. After that notice was issued no further changes were made to the type of hearing, the location, the date or time of the hearing. The parties were proceeding on the understanding that the hearing would take place in Hull as listed, on the 14 September 2020.
16. On 13 September 2020, at 23:14 the claimant sent an email to the Tribunal as follows:

"*Dear Sirs*

An hour or so ago, while visiting my friend and witness, David Dawson, for the first time since before lockdown in March, I decided to Google the tribunal in Hull in order to work out where to park and whether there was anywhere nearby where Mr. Dawson and I might grab breakfast. I was astounded to read this webpage:

https://courttribunalfinder.service.gov.uk/courts/hull-tribunal-hearing-centre

It tells the reader one should only go to the building if one has had a confirmation by phone, email or smoke signals that one's case is going ahead in person.

Within that page is another link to:

https://www.gov.uk/guidance/going-to-a-court-or-tribunal-during-the-coronavirus-covid-19-outbreak?_ga=2.30593791.1571864896.1600024797-693768405.1600024797

Both pages make it clear that HMCTS will <u>have</u> got in touch to actively confirm the hearing is going to take place. <u>This has not happened.</u>

Both pages hint strongly that one should not get in touch oneself to ask what the status of one's case is.

I must apologise as I sort of did.

All I had was a letter from a nameless Employment Judge asking the parties how many people were planning to attend.

In no way and by no interpretation - Remember though that no lesser mortal than the illustrious, infallible pillar of employment tribunal 'chairmanry', Susan Judith Chalmers Imminient Holidays Cold Wet Flannels Flouncer etc etc Cox, declared me too thick to identify and use the common adjective! ...- can that letter be said to confirm the hearing was going ahead in person.

Reading it back it could be said to be a letter asking for numbers (I see the respondents are coming mob-handed...) on the basis of which a decision could be taken whether to proceed.

I always do as I am told. It says, as elsewhere, not to attend unless one has had prior confirmation.

I am being rather naughty by writing, as I'm exhorted online to desist as the staff at HMCTS can't keep up because of coronavirus....

I have no doubt the tribunal chairman du jour will gleefully strike the case out as a result of my non-attendance despite the above.

EAT here I come....

I wrote and made the point the other day that I was 'vulnerable' and so, indeed, was my friend and witness, Mr. Dawson. I asked what if any risk assessment had been done or might need to be done.

Neither of us really fancy going somewhere we are unsure about to spend a day trapped in a confined space with 7 other people. 9 > 6 the last time I checked. I reoeat: Pretty dim me. Not sure my maths degree qualifies me to state with any certainty that 9 is indeed greater than 6.

'Rule of 6' from midnight tonight anybody?!

I am, as I've said many times, utterly exhausted by this. It's just another day of drudgery at the office for the person reading this. It's my good name and reputation...

I might go away and stay with friends for a bit of respite care while I still can and leave the laptop and mobile at home. Enough nonsense already!

Finally, might I just say that when I was clapping like a trained seal on a Thursday evening I was clapping for HMCTS staff who have to be the unsung heroes of the UK. Without them the country would grind to a halt. Sod the NHS! Thank you HMCTS!

I might start a campaign or petition to have HMCTS' staff knighted and their remuneration doubled at least.

Yours most faithfully
Anthony Neary"
(highlighted/underlined text is my emphasis)

17. At this hearing, the claimant confirmed that he had received the notice of hearing that required him to attend the hearing at Hull at 10 am on 14 September 2020. He also confirmed that when he checked his phone on the morning of the hearing, he was aware of, and had listened to the messages from the clerk asking him to make contact/attend the hearing. He saw the email sent by the Tribunal informing him the start of the hearing would be delayed until 1pm (Mr Frew refers to the full content of the email at paragraph 58). Despite the messages the claimant decided he would take his dog for a long walk in Bridlington and would not make any contact with the Tribunal. The claimant knew the respondent and

the Tribunal were waiting for him to attend/make contact. Contrary to what he states in his email, he did not 'go away and stay with friends' he was in Bridlington. If he was unsure about attending or sought reassurance, the easiest thing for him to do was to contact the Tribunal. While the claimant agrees he could have done that, knowing the start time had been delayed, he decided he would not attend or make contact because he was going to take his dog for a walk.

18. On the evening of 14 September at 21:47 the claimant emailed his MP (copied to the ET). He writes as follows:
"*I was* ***not told my tribunal hearing was going ahead in person. It didn't stop Mrs Janet Cresswell of Hull Tribunal leaving me 3 snotty demanding haranguing messages*** *…. She demanded I ring back by 11.30. I didn't even check my phone* ***before then*** *to see* ***missed calls****.* ***She needs to be told, also, that when has had one's words on the phone twisted as often as I have…one writes.*** *One does not ring these people in these offices who will usually swear you've been nasty etc". (highlighted text my emphasis)*
19. The claimant does not say when he checked his phone but his email confirms that by 11.30am he had seen the missed calls. He had received the email from the Tribunal but made no contact. He states he was 'not told' it was an attended hearing but that is not true, he knew it was an attended hearing. The claimant suggests he did not phone the clerk back because he did not want to be accused of being 'nasty' over the phone and prefers to put his words in writing, to avoid them being 'misconstrued'. If that was his concern he does not explain why he did not email the Tribunal. The only explanation he provided at this hearing was that he was not going to make contact/attend the hearing because he was walking his dog. The respondent invites me to treat that conduct as vexatious/unreasonable conduct of these proceedings to support the applications made for strike out and costs which I will address later in these reasons.

Respondent's submissions on the Strike out application

20. The respondent relies upon Rule 37(1) of the Rules of Procedure to strike out the claim "*on the grounds that it is vexatious and unreasonable conduct/or has no reasonable prospects of success*". The first ground Mr Frew relies upon is that the complaints made of discrimination and victimisation have no reasonable prospects of success.
21. The alleged discriminatory act is the withdrawal of the interview offer on 25 October 2019, a decision made by Mrs J Redfearn on behalf of the respondent. Mr Frew relies on the asserted facts set out in the application referring to paragraphs 11-16 and 24 of the claimant's witness statement and paragraphs 41-43 of Mrs Redfearn's statement, the application form and the emails exchanged between the claimant and Mrs Redfearn immediately after the conversation in which she informed the claimant that the offer of an interview had been withdrawn (pages 194 and 195).
22. Based on the asserted facts and the undisputed contemporaneous documents and putting the claimants case at his highest, Mr Frew contends there are no reasonable prospects of the claimant, on the balance of probabilities, establishing a prima facie case of discrimination or victimisation.
23. The respondent is a non-profit making service which provides East Riding Maintained Schools with supply teachers and supply support staff. Mrs Redfearn is employed as a Supply Service Manager. The respondent's recruitment process for supply staff must comply with the 'Safer Recruitment Department for Education Guidance'. In Mrs Redfearn's witness statement she explains the

recruitment process and asserts that the reason she retracted the invite for the interview was because she was unable to obtain a suitable reference to support the claimant's application. Although 2 referees had been named in the claimant's application form neither could comment on his teaching experience in a classroom. The claimant's statement also supports the facts asserted by Mrs Redfearn.

24. As well as those asserted facts, Mr Frew relies upon the undisputed contemporaneous emails. After the telephone call with the claimant, at 11:02 am on 25/10/2019, Mrs Redfearn sent an email to the claimant as follows:
"*Dear Anthony,*
Thank you for your application for Supply Teaching and your interest shown in East Riding Supply Service, but further to our telephone conversation, East Riding Supply Service cannot go ahead with the interview arranged on 6 November 2019 at 9.30am ***due to us not being able to obtain satisfactory references which would cover recent relevant experience within a classroom environment.*** *Please contact me if you require further clarification".*
25. The claimant wrote an email at 12.38 on 25/10/2019 to Mrs Redfearn (copied to his MP, Sir Greg Knight). The relevant parts of that email are:
"*Dear Jane*
Thank You for your confirmation.
I am very disappointed which, of course, is a modern-day PC euphemism for being really quite angry. Your negative attitude on the telephone was undeniable……I have just downloaded the ***latest Government safer recruitment guidelines and will scrutinise them in light of your decision……You know and I know Jane, that it is my status as a HIV+ man which drives your determination to keep me from the classroom.*** *You will of course, deny that. You are not the first. You will not be the last".*
26. The reference made by the claimant to the safer recruitment guidelines supports the respondent's case that the reason for withdrawing the interview was the inability to obtain a suitable reference. Mrs Redfearn's refers to this email in her witness statement (paragraph 42). She says "*at no point during the telephone conversation did Mr Neary mention anything about the nature of his disability. I had no knowledge of the nature of his disability and it was not in any way the reason for retracting the invite to interview*".
27. It was an agreed fact that there was no provision within the application process for the claimant to give any details of disability. The application form contains a 'Workforce and Disability Monitoring Form' which enables an applicant for employment to identify as 'disabled' without disclosing the nature of his disability. The claimant's application is at pages 247-248. The claimant identifies as 'disabled' without disclosing his 'particular' disability (HIV positive). He also provides his date of birth and the details of his referees.
28. The respondent's recruitment process leaves any discussion about the nature of an applicant's disability and any discussion about reasonable adjustments to the interview. In his witness statement the claimant does not assert any facts that he informed Mrs Redfearn (or anyone else at the respondent) that he is HIV positive before the offer of interview was withdrawn.
29. Mr Frew submits that without any facts that could prove Mrs Redfearn had knowledge he is HIV positive before the offer of interview was withdrawn, the claimant cannot establish a prima facie case that Mrs Redfearn was motivated (consciously or subconsciously) by his disability in making the decision for the

complaint of disability discrimination to succeed. The chronology of undisputed facts and undisputed contemporaneous emails supports the respondents case but does not assist the claimant in establishing liability.

30. Mr Frew also highlights that although the claimant provides a detailed account of his telephone conversation with Mrs Redfearn he does not make any reference to his disability or his age or the protected act he relies upon. For the claim to succeed the essential facts that need to have been asserted by the claimant are those disclosing the protected characteristics relied upon and the protected act. Those essential facts are missing. The claimant prepared his witness statement after the preliminary hearing knowing what facts he had to include to establish a prima facie case of discrimination/victimisation.
31. Mr Frew submits that the asserted facts in the claimant's statement support the respondents case. The claimant confirms that the only reason that was discussed in the call "*for withdrawing the offer of interview was because of the inability to obtain a suitable reference in relation to classroom teaching experience".* That reason is supported by the fact that the referees provided could not comment on the claimant's classroom teaching experience. One referee was an agency and the other a parent of a child the claimant privately tutored. The claimant is not asserting any facts to show he had supplied *'references which would cover recent relevant experience within a classroom environment'* to challenge the facts asserted by the respondent to support its defence.
32. Mr Frew then dealt with the age discrimination complaint. The claimant's date of birth was on the application form and he was offered an interview. No primary facts are asserted about his age or facts from which inferences can be drawn to support a prima facie case of less favourable treatment on the grounds of his age. In fact, the claimant has made a point of emphasising how great a demand there is for maths teachers (of any age) in schools because of the shortage.
33. The claimant's witness statement is also silent on the protected act he relies upon to support his complaint of victimisation. He does not assert any facts that that Mrs Redfearn had knowledge of the protected act relied upon that "***he had issued proceedings against Leeds City Council in the Employment Tribunal complaining of a breach of the 2010 Act"*** before she withdrew the offer.
34. Mr Frew submits that the claimant purely speculates about why his application was 'discounted' and mere speculation is not enough. The claimant has not asserted the facts necessary to establish a prima facie case. The claimant states as follows:

> *"What happened between the first and second calls from ERYC/ERSS back in late October to change their minds? What did they discover? What were they told? Why didn't they follow 'safer recruitment guidelines' which instruct school leaders to give applicants the opportunity at interview to explain* ***anomalies in their applications, references*** *etc?* ***Something*** *truly heinous* ***must have been said*** *in order for an agency which makes money for the council out of the placement of supply teachers -and few are in more demand than maths bods-* ***to discount an applicant*** *and hence lose money themselves. How would Mrs Redfern feel if treated in this way but not told why she was being treated in this way? The lack of humanity is astounding. I dare say Mrs Redfern believes the* ***Nazi guard ladies whom we are told went along the ranks of bunk selecting people to the gas chambers were "just doing their jobs" and***

> ***"earning a living"… There are parallels here!*** *There can be no excusing treating one one's fellow man badly or in a lesser way than that in which one would have others treat oneself. It is deplorable. I doubt the chairman would agree. They spend their lives treating people badly quote 'for kicks'. Interestingly, the judiciary treat leniently time again the very people they should treat badly. What a cock-eyed country!"*

35. From that paragraph Mr Frew draws my attention to the gratuitous and highly offensive comments made by the claimant about Mrs Redfearn. The claimant has suggested that Mrs Redfearn in the performance of her job is akin to a '*Nazi guard ladies selecting people to go to the gas chambers*'. These comments are completely unnecessary to these proceedings and were very upsetting comments for Mrs Redfearn to see as a witness in these proceedings. The respondent relies on these offensive comments as vexatious and unreasonable conduct of these proceedings by the claimant. Mr Frew submits that while the claimant can legitimately set out the facts he relies upon, which might conflict with the respondent's case, he is not entitled to make offensive comments, just because he has brought these proceedings.
36. Additionally, it is apparent from the statement that the claimant can spend time including unnecessary offence while completely omitting the essential facts required to support the claim he makes. Mr Frew submits that the best the claimant does is to speculate about the 'something' he thinks must have been said without saying what that 'something' is. He does not advance any primary facts from which a prima face case of discrimination or victimisation could be established.
37. Mr Frew submits that in those circumstances the burden of proof does not shift to the respondent to explain the decision to withdraw the offer. If it did the undisputed core facts advanced by the respondent which are supported by the undisputed contemporaneous documents, conclusively disprove the claimant's case and prove the innocent (non-discriminatory) explanation for the withdrawal of the offer of interview which was the claimant's inability to provide a suitable reference.
38. Mr Frew relies on the case of **Mechkarov – Citibank (2016) ICR 1121** where the Employment Appeal Tribunal reminded Tribunals to exercise caution in considering striking out a claim but *"if the claimant's case is "conclusively disproved by or is totally and inexplicably inconsistent, with the undisputed contemporaneous documents it may be struck out".* He submits that this claim falls into that category.
39. For all those reasons, Mr Frew submits that the claim and all three complaints should be struck out on the grounds they have no reasonable prospects of success. If that threshold is not met the respondent's alternative position is that the complaints have little reasonable prospects of success and a deposit order is made. He suggests the amount of deposit should be £3,000 (£1,000 for each complaint) as a condition of the claim proceeding. He suggests the maximum amount because the claimant was invited to and has failed to provide any information in advance of this hearing, about his 'ability to pay' a costs order/deposit. If the claimant chooses not to provide information about his 'ability to pay' after reasonable enquiries have been made then the Tribunal cannot have regard to that information and should assume the claimant has the 'ability to pay'.

Claimant's response to the strike out application

40. The clamant said there was "*very good reason to bring this claim*" there is '*more than meets the eye*'. He said: "*I am not talking about my disability*" or "*getting into the realms of the nuts and bolts of the evidence which can come later at a hearing*". He said the he would '*leave it hanging there'. He said the 'whole thing is cockeyed'. He said he "Absolutely can succeed and the argument that his claim has no reasonable prospects of success is nonsense"*.
41. In relation to 'ability to pay' the claimant offered limited information about his means/capital. All he was willing to say was that he is in receipt of Employment Support Allowance and is looking for work. He is in debt to his family. He has no money to pay and may as well be ordered to pay £3 million not £3,000 because he cannot pay any sum. No further information about 'ability to pay' was provided. The claimant was reminded that this was his final opportunity to provide information about capital/ income/expenditure, (having failed to provide it before this hearing) if he wanted that information to be considered.

Conclusions on Strike out application.

42. Despite the detailed arguments advanced by the respondent and the opportunities given (before and at this hearing) the claimant has chosen to provide a very limited response. I remind myself that I must carefully consider the application made by the respondent based on all the information that is available to me and exercise caution when a respondent seeks to strike out a claim of discrimination.
43. Rule 37 provides a discretionary power that "a Tribunal **may** strike out all or part" but only if satisfied that all or part of the claim has 'no reasonable prospect of success'.
44. In **Anyanwu-v- Southbank Student's Union 2001 ICR 391,** the House of Lords highlighted the importance of not striking out discrimination claims, expect in the most obvious/exceptional cases. This is because these cases are generally fact sensitive and require full examination to make a proper determination.
45. In **MechKarov, (**cited by Mr Frew) Miting J summarised the approach that should be taken by a Tribunal when considering striking out a discrimination claim, on the ground it has no reasonable prospects of success. Where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing the oral evidence. A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts. The claimant's case must be taken at its highest. And as Mr Frew points out if the claimant's case is '*conclusively disproved or is totally and inexplicably inconsistent with the undisputed contemporaneous documents*', it may be struck out.
46. Where strike out is sought or contemplated, the Tribunal must first consider whether on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. It is a high test (**Balls-v- Downham Market High School and College 2010 UKEAT 0343/10**).
47. More recently in **Ahir-v British Airways Plc 2017 EWCA Civ 1392** Lord Justice Underhill provides useful guidance on the application of rule 37, in circumstances where the Tribunal has made an assessment that there are no reasonable prospects of a party establishing the facts necessary to liability being established. At paragraph 16:

> *"Employment Tribunals should not be deterred from striking out claims, including discrimination claims which involve a dispute of fact,* ***if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established****,* ***and also provided they are***

> ***keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored particularly in a discrimination context.*** *Whether the necessary test is met in a particular case, depends on the exercise of judgment, and* ***I am not sure that that exercise is assisted by attempting to gloss the well understood language of a rule by reference to other phrases or adjectives or by debating the difference between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities"****.*

48. I took that guidance into account and assessed on the information available to me for each complaint, whether I could properly conclude that there were no reasonable prospects of the facts necessary to liability, being established by the claimant. This application was first raised at the substantive hearing and has been made with the parties having had sight of all the documentary evidence and witness evidence that is relied upon. This means the claimant has had the opportunity to highlight any asserted facts/evidence he wishes to rely on to resist the applications in the way the respondent has done to support the applications made.
49. Furthermore, the record of the preliminary hearing (see paragraph 13) confirms that the complaints and issues for each complaint were identified and the burden of proof provisions were explained to the claimant so that he understood what he was required to prove for liability to be established for the complaints to succeed. Those provisions (section 136 Equality Act 2010) provide that the claimant must *establish facts* from which the Tribunal *could decide*, in the absence of any other explanation, that the respondent had by withdrawing the offer of an interview directly discriminated against him because of a protected characteristic (his 'age' and 'disability') in contravention of section 13 Equality Act 2010 or victimised him for doing a protected act(bringing proceedings under the Equality Act 2010) in contravention of section 27 Equality Act 2010.

Disability Discrimination complaint

50. Section 6(3) of the Equality Act 2010 makes it clear that in relation to the protected characteristic of 'disability', "*a reference to a person who has a particular protected characteristic, is a reference to a person who has a* ***particular disability****"* which for the claimant's is that he is HIV positive. I agree with Mr Frew's submissions (paragraphs 31-33) that the claimant has not asserted any facts that establish that the respondent had knowledge the claimant is HIV positive before the decision to withdraw the offer was made which are necessary for liability to be established. The undisputed facts and the undisputed contemporaneous documents disprove the claimants case and support the respondent's case. Mrs. Redfearn did not know the claimant is HIV positive until after she withdrew the offer of interview and could not have been motivated by his disability in that decision.

Age Discrimination complaint

51. Section 5 of the Equality Act provides that "*in relation to the protected characteristic of 'age', a reference to a person who has a particular characteristic is a reference to a person of a particular age group'*. And a reference to an '*age group*' is a '*reference to a group of persons defined by reference to age whether by reference to a particular age or to a range of ages*'. Again, when this complaint was discussed with the claimant at the preliminary hearing, the legal

requirements to establish liability for age discrimination were explained (see paragraph 13). The claimant's witness statement is completely silent on age. He does not say why his 'age' is a protected characteristic by reference to his particular age or to a range of ages. His age was declared on the application form and he was offered an interview. The claimant does not assert any facts that he was less favourably treated on the grounds of his age in comparison with a hypothetical comparator of a different age/age group in the same material circumstances as the claimant. The material circumstances of the hypothetical comparator would also include an applicant for employment without *a suitable reference in relation to classroom teaching experience.* Would the offer of an interview have been withdrawn for the hypothetical comparator in those circumstances? I agree with Mr Frew's submission that there are no primary facts advanced by the claimant, to establish a prima facie case of less favourable treatment on the grounds of age.

Victimisation complaint

52. For the victimisation complaint, the claimant's witness statement is again silent about the protected act that he relies upon. He makes no mention of proceedings issued against Leeds City Council in the Employment Tribunal in 2015, complaining of a breach of the 2010 Act. He does not assert any facts that Mrs Redfearn had any knowledge of those proceedings or that she withdrew the offer of an interview because of those proceedings.
53. Although the claimant opposes the application made and suggests the arguments made by the respondent are '*nonsense*' he provides nothing to support his position as he is unwilling to discuss the '*nuts and bolts*'. If the claimant wants to persuade me that the strike out application should be refused he needs to at least explain how he would establish liability on the facts asserted by him, the undisputed facts and undisputed contemporaneous documents. The claimant has not made any meaningful representations to persuade me his complaints have reasonable prospects of success. I accept and prefer the submissions made by Mr Frew on behalf of the respondent.
54. In conclusion at the heart of this claim is the respondent's withdrawal of an offer of an interview for a supply teacher, who was expected to teach in a classroom. It is not disputed that the claimant was unable to provide references to show that he had the classroom teaching experience required for the safe recruitment of teachers in the respondent's schools. The unlikely case the claimant advances based on pure speculation is that 'it must be something else' without saying what the 'something else' is. The claimant ignores the undisputed fact that he was unable to provide the references required. The undisputed core facts are supported by the undisputed contemporaneous documents which conclusively disprove the claimant's case and support the respondents case. What was there was an innocent (non-discriminatory) explanation for the withdrawal of the offer of interview: the 'something' was the claimant's inability to provide a suitable reference.
55. Applying the guidance given in the cases referred to, putting the claimant's case at its highest on the available material, my assessment is that there are no reasonable prospects of the facts necessary for liability to be established in any of the complaints made of disability or age discrimination or victimisation. Accordingly, the claim is struck out.
56. Having made the assessment that each complaint has no reasonable prospects of success it was not, in my view, appropriate for me to consider making a deposit

order on the grounds of little reasonable prospects of success. I am satisfied the threshold of 'no reasonable prospects of success' is met for each complaint and that it is appropriate for me to exercise my discretion to strike out the claim. Having struck out the claim on that ground it was not necessary for me to consider striking out the claim on the other ground relied upon by the respondent of unreasonable or vexatious conduct, which is a ground relied upon to support the costs application.

Respondent's Costs Application

57. The respondent relies upon rule 76(a) of the Tribunals Rules of Procedure which provides that:

"A tribunal may make a costs order and shall consider whether to do so, where it considers that-

a) A party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing proceedings (or part) or the way that the proceedings (or part) have been conducted"

58. The application refers to and relies upon the conduct of the claimant on 14 September 2020 which I am invited to treat as vexatious and unreasonable conduct of these proceedings to support the making of a costs order. Mr. Frew relies on the background to the claimants admitted failure dealt with earlier in these reasons and following further details to support the application for a costs order:

- By letter dated 30 July 2020, the Employment Tribunal provided "*I do not require the Respondent's comments on the Claimant's letter. The Claimant does not appear to be making any applications in the letters. The Tribunal has made clear Case Management Orders, the timetable for which now appears in the Tribunals letter of 22 June 2020.The hearing will proceed as listed in Hull on 14 September 2020, where the parties must attend".*
- By email correspondence dated 8 September 2020 the Claimant provided "*I will be attending with my friend and witness David Dawson"* and "*any chance you can get me a polite interlocuter with in excess of half a brain cell for next Monday"* (that was 14 September 2020 with 8 September 2020 being the Tuesday before).
- The Employment Tribunal wrote on 8 September 2020 "*you can request a risk assessment from Julie Myers by emailing ….stating that you would like a risk assessment for your attended hearing on 14 September 2020 in Hull*".
- A risk assessment was provided.
- By email correspondence dated 13 September (the night before the hearing) the claimant sent the Tribunal and email (see paragraph 16 for the full content of that email).
- On the day of the hearing the Employment Tribunal (EJ Rogerson wrote: "*Employment Judge Rogerson has seen the Claimant's email dated 13 September 2020 sent at 23;11. The Claimant has had written notice of the Hearing confirming it was going to proceed on 14 September 2020.He has not been informed that the Hearing would not proceed as listed. The claimant's last communication with the Tribunal of 8 September*

2020 also confirmed his understanding that the Hearing would proceed as listed on 14 September 2020.The start time of the Hearing is now delayed until 1pm today (14 September 2020) to allow the claimant time to attend the Hearing. A message to that effect has been left on the Claimant's mobile number. If the Claimant does not attend/respond to those communications the Hearing will proceed at 1pm and will consider any application made by the Respondent about these proceedings as a result of the Claimant's failure to attend at either 10am or 1pm"

59. Mr. Frew relies on the case of ***Barnsley Metroplitan Borough Council -v- Yerrakalva 2012IRLR 78(paragraph 41)*** to remind the Tribunal that *" The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had."*
60. Mr. Frew submits that the claimant chose to make himself unavailable and ignored the attempts made by the Tribunal to communicate with him on the day of the substantive hearing. Had he done so the proceedings could have commenced at 1pm.They did not because the claimant either made himself unavailable or ignored attempts by the Tribunal to communicate with him. The only explanation he gives without any embarrassment or apology, is that instead of taking any of those reasonable steps, he took the step of walking his dog. He has had no regard to the effects of his unreasonable conduct on these proceedings and the costs incurred by the respondent.
61. Mr. Frew submits those costs are the external costs incurred by the respondent relation to Mr. Frew's fees for the hearing on 14 September 2020 of £1800 (£1500 plus £300 VAT), and the costs of this hearing in the sum of £1000 making the total sum £2,500
62. In addition to that conduct Mr. Frew submits that the claimant's other conduct of these proceedings has been unreasonable and 'vexatious' conduct falling within the definition given by Lord Bingham in **Attorney General -v- Barker 2000 1 FLR 759 QBD**. " *The hall mark of a vexatious proceeding is that it has little or no basis in law (or at least discernable basis): that whatever the intention of the proceedings 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 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"*.
63. Mr. Frew contends that the claimant is using these proceedings to vent his personal grievances against the judicial system and the school system which he suggests is letting down 'white working-class boys'. The claimant does this by sending copious amounts of outrageous and gratuitously offensive communications, for no reason, other than to cause inconvenience and expense and to harass the respondent. Even in the claimant's witness statement he uses the words: "*I dare say Mrs. Redfearn believes Nazi guard ladies who we are told went along the ranks of bunk selecting people for the gas chamber were "just doing their jobs and "earning a living". There are parallels here!"* for the sole purpose of offending and upsetting Mrs. Redfearn.

64. Mr. Frew points out that the claimant states that he prefers to communicate in writing to avoid being accused of being 'nasty' or having his words 'misconstrued'. Mr. Frew submits the words used are therefore deliberate and intentional. The claimant also enjoys insulting the judiciary and specifically Employment Tribunal Judges. A cursory read of any of the copious emails sent by the claimant is sufficient to illustrate this point. The effects are that the respondent (and the Tribunal) has had to spend time and resources considering these communications to work out, if any of the content is relevant to these proceedings, which for the respondent, has added to the costs of defending these proceedings. Most of the content is irrelevant to the claim. Mr. Frew contends that while the claimant might find it amusing, the effects of his conduct, pursuing a claim which had no basis in law, is to cause inconvenience harassment and expense to the respondent, out of all proportion to the hopeless claim that has been brought. This conduct justifies making a costs order in the amount claimed.

Claimant's response to Costs Application

65. The claimant does not agree the 'offence' in the emails he sends or in his witness statement is 'gratuitous' offence. He says that 'gratuitous' would imply it is 'baseless' which is not the case. He says it is '*considered opinion based on fact'* and that he *'never throws the first punch*'. He does not agree that his claim has little or no basis in law, but does not say why it has any basis in law. He is unwilling to discuss the '*nuts and bolts*' which he says can be left to the substantive hearing. He said he could chose to walk his dog because he has better things to do. He genuinely wants the chance to go back into the classroom. He said the system was failing working class white kids which might not be an opinion '*on trend*' in Mr. Frew's '*politically correct, no doubt 'guardian reader' world*'. He said that '*working class white kids*' are '*buggered*' by the system. As to what is written about Mrs. Redfearn, the claimant poses the question "*who would do it for kicks?"*. He objects to any costs order being made and to any VAT being paid on the fees claimed by Mr. Frew because the VAT is recoverable and cannot be claimed as part of the respondent's costs. As to his ability to pay costs the information the claimant to me provided at this hearing is set out at paragraph 41.

Rule of Procedure 2013

66. Rule 71 provides that a party may apply for a costs order and that '*no such order may be, made unless the paying party has had a reasonable opportunity to make representations at a hearing or in writing*'.
67. Rule 76 provides that a Tribunal '*may make a costs order and shall consider whether to do so where it considers that a party has acted unreasonably in the way that the proceedings (or part) have been conducted*'.
68. Where a Tribunal exercises it discretion to make a costs order then the amount awarded should normally reflect the Tribunal's assessment of what is both reasonable and proportionate, with any doubt to be resolved in the favour of the paying party. This is the standard and usual basis of assessment. In **Yerraklava- v- Barnsley Metropolitan Borough Council 2012 ICR420,** the Court of Appeal provided guidance that costs should be limited to those '*reasonably and necessary incurred*' as a consequence of the unreasonable conduct. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

69. 'Costs' means fees charges, disbursements or expenses incurred by or on behalf of the receiving party (Rule 74: Definitions)
70. Rule 84 provides that in deciding whether to make a costs order and in deciding the amount the Tribunal may have regard to the paying party's ability to pay.
71. In assessing means, account must be taken of information (if it is provided) of capital as well as income and expenditure. In **Shields Automotive Ltd -v- Grieg** the EAT stated that *"assessing a person's ability to pay involves considering their whole means. Capital is highly relevant aspect of anyone's means. To look only at income where a person has capital is to ignore a relevant factor*'.
72. A Tribunal is not required to limit the costs that the paying party can afford to pay - **Arrowsmith -v- Nottingham Trent University 2012 ICR 159 CA.** There is "*no reason why affordability has to be decided once and for all by reference to a party's means as to the moment the order falls to be made".*
73. If a costs order is made, it would have to be enforced through the county court, which would itself, take into account the individual's means from time to time in deciding payment methods and amounts. **Vaughan-v- London Borough of Lewisham and Others 2013 IRLR 713.**
74. The regulations do not mean that "*poor litigants may behave without impunity and without fear, that a significant costs order will be made against them, whereas wealthy ones must behave themselves otherwise a costs order will be made"* **Kovacs -v- Queen Mary and Westfield College (2002) IRLR 414**.

Conclusions on Costs Application

75. Dealing firstly, with Mr Frew's submission that the claimant's use of 'gratuitous offence' in these proceedings (directed towards witnesses and others) is unreasonable/vexatious conduct of these proceedings to support the application for a costs order. I agree that the claimant is using gratuitous offence in emails and in his witness statement, for improper purposes: to pursue his personal grievances and for his own amusement ("*a purpose or in a way which is significantly different from the ordinary and proper use of the court process")*. The claimant does not explain why that offensive content is included when it is not relevant. All the claimant says in response to the submissions made by the respondent, is that it is not 'gratuitous' offence because it is '*considered opinion based on fact'* suggesting his conduct is justified because he never 'throws the first punch'. I disagree with the claimant's interpretation, it is gratuitous offence.
76. I agree with Mr. Frew's submissions points at paragraphs 34- 36 and 64 and find the gratuitous offence is deliberate and intentional conduct. It is not considered opinion based on fact for the claimant to say "*I dare say Mrs Redfern believes the* ***Nazi guard ladies whom we are told went along the ranks of bunk selecting people to the gas chambers were "just doing their jobs" and "earning a living"… There are parallels here!".*** Why does the claimant include that hurtful opinion while omitting the essential facts to support the complaints brought, which would be the proper purpose of his witness statement? I agree with Mr Frew the claimant's purpose in including those comments, was to vent his personal grievances, it was for his amusement and was done for 'kicks'. Mrs. Redfearn as a witness in these proceedings is not expected to tolerate that conduct, which is unreasonable conduct of these proceedings.
77. The claimant's conduct sending emails containing repeated gratuitous offence directed towards Employment Judges is also not a reasonable or proper way to

conduct these proceedings. While Employment Judges are expected to have broad backs and the words 'phlegmatic fortitude' come to mind, the content is a distraction and serves no purpose in these proceedings, other than to amuse the claimant or to vent his personal grievances. The claimant could properly and reasonably conduct these proceedings without that content. While all of that is true, my approach at this hearing was to ignore the offensive content, and focus instead on what was relevant, to decide the applications made by the respondent. Costs orders should not made be made in favour of a party to punish the other party. Mr Frew does not suggest the effects of that conduct are that any specific amount of costs have been incurred by the respondent.

78. The respondent does submit that external costs have been incurred by the claimant conduct in relation to the substantive hearing on 14 September 2020. My findings of fact about that conduct are set out in these reasons at paragraphs 2-4 and 15-19. Those findings of fact support the submissions made by Mr. Frew, with which I agree.
79. The claimant knew the hearing was attended. He had received the notice of hearing. He was aware that the respondent would be attending with counsel and witnesses on that day and that the Tribunal would also be attending. The claimant's email suggesting the Tribunal had not confirmed '***the hearing is going to take place'*** *is* complete nonsense. Not only did the claimant know the hearing was going to take place on 14 September 2020 but he also knew the Tribunal had tried to contact him, when he failed to attend at the scheduled time. He saw the missed calls from the Tribunal by 11.30am and made no attempt to call back or respond by email. He knew the start time had been delayed to 1pm and that he still had time to attend the hearing or make contact. The only explanation the claimant has provided at this hearing for his failure to attend or contact the Tribunal, is that he decided to take his dog for a walk. I had no hesitation in finding that the claimants conduct in relation to his failure to attend the hearing at 10am or 1pm, his failure to answer the calls made by the Tribunal or make contact in writing/or by phone on 14 September 2020, is unreasonable conduct of these proceedings by the claimant.
80. Based on the findings made of unreasonable conduct I am satisfied the respondent has shown the grounds for making a costs order. I then considered whether I should exercise my discretion to make a costs order and was satisfied that a costs order should be made on the grounds of the claimant's unreasonable conduct. The claimant's unreasonable conduct was deliberate and inexcusable. I considered the effects of that unreasonable conduct. Mr. Frew's application seeks the costs incurred by the respondent (a public authority) limited to the external costs incurred by the respondent of the brief fee for the substantive hearing of £1500 with VAT and the fee for this hearing of £1000 plus VAT.
81. Very limited information has been provided by the claimant about his 'ability to pay' if a costs order is made and as to the amount of the costs order (see paragraphs 41). Mr. Frew accordingly invites me to proceed on the basis, that if full information about 'ability to pay' is not disclosed to oppose the application made, the full amount should be awarded, because it can be taken that the sums claimed are a reasonable and proportionate amount.
82. The information I have is that the claimant is currently out of work but is looking for work. I do not know if he has any capital assets. It is odd that the claimant has not been more forthcoming with information about capital assets income and expenditure, if that information would assist him. I am told math's teachers are in

demand and in short supply. Private tutoring is work the claimant has done and can do, now and in the future. The claimant does not say he has no future prospect of finding work.

83. I have considered the limited information provided by the claimant and consider a reasonable and proportionate amount of costs to award is £1500 (representing counsel's fees without VAT). I have capped the costs order at £1500 (not awarding the £2,500 plus VAT claimed) to take account of all the available information.

Employment Judge Rogerson

Employment Judge Rogerson
Date: 13 January 2021
Sent to the parties on:
Date: 18 January 2021