EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr D Warburton	**v**	5 Essex Court Jeremy Johnson QC

Heard at: Norwich **On:** 21 September 2020

Before: Employment Judge S Moore

Appearances
For the Claimant: Mr D Flood, Counsel
For the Respondent: Mr M Sutton QC, Counsel

JUDGMENT

(1) The Respondents' application to strike out the claims is dismissed.

(2) The Claimant must pay a deposit of £150 as a condition of continuing to advance his claims of victimisation and/or discrimination arising from disability pursuant, respectively, to sections 27 and 15 of the Equality Act 2010.

(3) The deposit of £150 must be paid within 21 days.

REASONS

Introduction

1. This was the Respondents' application to strike out the claims of disability discrimination (victimisation and disability related discrimination) pursuant to Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 on the ground that they have no reasonable prospect of success, alternatively for a deposit order on the ground they have little reasonable prospect of success.

2. The Claimant's case arises out of the rejection of his application for pupillage with the First Respondent and was summarised by Judge Warren at a closed Preliminary Hearing on 15 June 2020 as follows:

   i. He applied to join the Hertfordshire police.
   ii. His application was unsuccessful because of the perceived tone of his communications with them.
   iii. The tone of his communications is caused by his anxiety and depression.
   iv. He is pursuing an extant claim of disability discrimination against Hertfordshire police.
   v. At a preliminary hearing in that case, Hertfordshire police were represented by Mr Jeremy Johnson QC, the Second Respondent.
   vi. He subsequently applied for pupillage with the First Respondent. The Second Respondent is chair of the First Respondent's pupillage committee.
   vii. The Second Respondent ensured that Mr Warburton's pupillage application did not succeed.
   viii. He claims victimisation and disability related discrimination. The "something arising" in respect of the disability related discrimination claim is the tone of his communications with Hertfordshire police.

Documentary Evidence

3. For the purpose of this hearing I was supplied with a bundle of documents from which the chronology of the Claimant's pupillage application to the First Respondent can be further "unpacked" as follows:

   i. The Claimant submitted a pupillage application to the First Respondent on 7 or 11 February 2019.
   ii. In accordance with the policy of the First Respondent that application was anonymised so that the Claimant became identified on the application as "Applicant 180190".
   iii. In an unassessed section of the application form, where applicants are to identify where they first heard of the First Respondent, the Claimant had written "I have bought a claim in the Employment Tribunal against the Chief Constable of Hertfordshire, who is represented by Jeremy Johnson QC. That action is currently live."
   iv. For the purpose of an initial paper sift of applications, the Claimant's application was distributed to a member of the pupillage committee, Ms Georgina Wolfe, for marking.
   v. On 13 February 2019 the Second Respondent emailed the Bar Council Ethics Enquiries Service ("BCEES") a number of questions concerning the Claimant's application.
   vi. In that email the Second Respondent stated "The view of my client [Hertford Constabulary] is that he was thoroughly unsuitable for appointment as a police constable. My view, having been involved in the various strands of litigation he has brought, is that he is also thoroughly unsuitable for selection as a pupil in chambers."
   vii. The Second Respondent then went on to ask the BCEES whether there was any reason why he should not draw the attention of the colleague in

Chambers considering that application to factors the Second Respondent was aware of through his conduct of litigation for Hertfordshire police, and whether there was any reason why those factors should not then be taken into account by that colleague when they assessed that application.

viii. On 15 February 2019 the BCEES informed the Second Respondent that there was no reason why he should not communicate with the person considering the Claimant's application and draw factors of which he was aware to their attention.

ix. When assessing his application, Ms Wolfe marked the Claimant as only partially meeting criteria in respect of (i) mini-pupillages, (ii) clarity and presentation and (iii) genuine interest in Chambers. She also noted he had not identified any mooting/debating/advocacy experience. All of these criteria had to be marked as "fully met" to allow an applicant to proceed past the paper sift.

x. On 19 March 2019 the Claimant received notification he had failed to progress past the paper sift.

xi. On 20 March 2019 the Second Respondent replied to an email from Ms Afzal Chowdhury of Hertfordshire police (following a subject access request by the Claimant to Hertfordshire police). In that email the Second Respondent stated the Claimant had applied for pupillage at the First Respondent, that the Second Respondent had taken steps to ensure the application was considered by another member of the committee, and that he (the Second Respondent) did not read the Claimant's paper application or speak to the other member of the committee in advance of them making a decision on the application.

4. The Claimant's case is that the Second Respondent must have spoken to Ms Wolfe and/or put pressure on her to reject his application and/or to mark it in such as a way as to cause it to be rejected.

Submissions

5. Mr Sutton QC contends the claims are wholly speculative and have no reasonable prospect of success. He points to statements in the bundle from the Second Respondent, the Chambers Administrator, Ms Kate Cousins, and Ms Wolfe which contain the evidence they would give at any substantive hearing of the matter. Those statements state:

i. In 2019 the First Respondent had 250 applications for pupillage from which 2 offers of pupillage were made.

ii. All pupillage applications are anonymised before being distributed amongst the members of the pupillage committee by Ms Kate Cousins the Chambers Administrator.

iii. The Second Respondent in his capacity as Chair of the First Respondent's pupillage committee received a reply from the Claimant to the acknowledgement of receipt of his pupillage application, and recognised his name.

iv. On 13 February 2019 the Second Respondent requested Ms Kate Cousins that the Claimant's application should not be allocated to him, without giving reasons for that request.

v. On receipt of BCEES's response of 15 February 2019, the Second Respondent decided it would be better if he did not have any involvement in the Claimant's application until it had been marked in case it gave rise to difficulties, and he had no communication with Ms Wolfe or any other member of the pupillage committee concerning the Claimant's application until 18 March 2019.
vi. On 18 March 2019 the Second Respondent met Ms Wolfe at a professional event. Ms Wolfe told the Second Respondent that one of the pupillage applications she had marked came from an applicant who had been involved in litigation in which he was acting, and that the application had not passed the sift stage.
vii. At a Chambers meeting on 19 March 2019 those pupillage applications in the "yes" or "maybe" list were discussed and a decision made as to whom to offer a first-round interview. The Claimant's application was not in the 'yes" or "maybe" list and was not discussed.
viii. After the meeting the Second Respondent spoke to Ms Wolfe about the Claimant's application and saw her marking sheet which had resulted in him not passing the sift stage.
ix. On the evening of 19 March 2019, the Second Respondent sent emails to all applicants, including the Claimant, informing them whether or not they had been accepted for interview.
x. Accordingly, the decision to reject the Claimant's application was made entirely by Ms Wolfe without any involvement from the Second Respondent.

6. As regards the legal principles, Mr Sutton QC submitted that although the law is established that the Tribunal's power to strike out should be exercised cautiously and that the bar is set high, recent cases have shown that the Tribunal is willing to exercise that power under rule 37(1) where the complaints are patently without substance, even in discrimination claims.

7. In **Ahir v British Airways plc [2017] EWCA Civ 1392, CA**, Underhill LJ stated at [16] that "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 no reasonable prospect of the facts necessary to liability being established." And at [18] "On the face of it, none of the relevant individuals had any knowledge of [the protected acts], let alone was motivated by them. On the face of it, this was a case of dismissal for the dishonesty involved in the appellant having submitted a CV which gave a false account of the circumstances of his departure from Continental Tyres." Underhill LJ continued at [19]:

"I have, of course, twice used the phrase 'on the face of it'. That invites the obvious riposte that the whole problem with a strike-out is that the appellant has no chance to explore what may lie beneath the surface, in particular by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she

believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it."

8. I was also referred to [53] of **Roy v Stephenson Harwood Services Ltd EAT 0145/17** (unreported), where Choudhury J stated that a tribunal had correctly described a claim of discrimination on grounds of sexual orientation as "entirely fanciful" and himself described the claim as "entirely speculative…based on gossip and in the face of obviously contradictory facts…"

9. Finally I was referred to **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**, **CA**, where at [77] Underhill LJ stated that that "there is no absolute rule against striking out a claim where there are factual issues…Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed."

10. Mr Sutton QC submitted that the Claimant's claim fell into the same category as those struck out in the cases above. His claims were entirely speculative and based upon the simple fact of the coincidence of the Second Respondent representing the Hertfordshire Constabulary and the rejection of his application. Further the Second Respondent's e-mail to the BCEES sought advice and demonstrated the care with which he was approaching the fact of the Claimant having made a pupillage application, it was not evidential grounding for a discrimination claim but rather neutral in character. The Claimant could advance no evidence that the Second Respondent did anything other than he said he did in his witness statements, and the Second Respondent's statement was supported and corroborated by the statement of Ms Wolfe and by his contemporaneous email to Mr Chowdhury. There was no realistic basis for disputing the veracity of the accounts of either the Second Respondent or Ms Wolfe.

11. Mr Sutton QC also pointed to paragraph 35 of the Claimant's witness statement in which he stated that the Second Respondent's "view of me as being "thoroughly unsuitable for selection as a pupil in chambers" <u>can only</u> have come from the alleged rudeness of my communications with members of Hertfordshire Constabulary (which, as he knew arose in consequence of my disability) and/or the fact that I had brought discrimination proceedings against the Chief Constable". Mr Sutton QC submitted this statement was misleading and promoted a false impression. Significant concerns about the Claimant's past conduct, including the use of racially inflammatory language and repeat offending, had been uncovered by Hertfordshire Constabulary's vetting officers and were summarised in the judgment of EJ Smail in the context of the Claimant's claims against the Constabulary. The Claimant knew the Second Respondent was aware of this history of discreditable behavior and also that it provided an obvious justification for the Second Respondent's concerns about the Claimant's suitability for pupillage. Mr Sutton QC submitted this matter was relevant to the overall exercise of my judgment. (He clarified, however, that he was not submitting the claims had no reasonable prospect of success on a second basis that even if the Second Respondent had put pressure on Ms Wolfe to reject the Claimant's application there was

no reasonable prospect of the Claimant establishing the Second Respondent was motivated to do so because of the Claimant's perceived rudeness to Hertfordshire Constabulary and/or his bringing of proceedings against them, rather than because of his knowledge of Claimant's history of discreditable behaviour.)

12. In the event that his primary application for a strike out order did not succeed, Mr Sutton QC asked the Tribunal to make a deposit order in the maximum amount and in respect of both of the Claimant's complaints.

13. Mr Flood submitted that the authorities to which Mr Sutton QC referred did not amount to a change or tension in the law. The bar for striking out a claim remained high and that was particularly the case in a discrimination case. He referred to the statement of Kay LJ in **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603** at [29] that: "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." And, to similar effect, **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755** at [30] and **Romanowska v Aspirations Care Ltd UKEAT/0015/14** (25 June 2014, unreported) at [15]. Discrimination cases should not be struck out except in the very clearest circumstances (**Anyanwu v South Bank Students' Union [2001] IRLR 305**, **HL** per Lord Steyn at [24] and Lord Hope at [37]; **QDOS Consulting Ltd v Swanson UKEAT/0495/11 (12 April 2012**, unreported, per Judge Serota QC at [48]-[49]).

14. Further, the facts of this case were different from those relied on by Mr Sutton QC. Using the phrase of Underhill LJ in **Ahir v British Airways plc** at [16], the Claimant did have reason to suppose that things were not what they seemed. The Second Respondent's email to the BCEES demonstrated his desire to insert his views of the Claimant into the pupillage application process and took the Claimant's case over the threshold of being merely fanciful. If a tribunal were to accept everything that the Respondents' witness statements said about the pupillage application process and the handling of the Claimant's application then that would amount to a complete defence to the claims, but such a submission could only be made at the conclusion of a hearing if that evidence emerged unscathed from the process of cross-examination.

15. In this respect Mr Flood further submitted that there were aspects of the Respondents' witness statements that positively invited further questions. In particular, Ms Wolfe noting the Claimant's comment on his application that he had brought a claim in the Employment Tribunal against the Chief Constable of Hertfordshire who is represented by Jeremy Johnson QC, but stating that it had no bearing on her assessment of his application (at para 20 of her statement). And Ms Wolfe mentioning that fact to the Second Respondent on 18 March 2019 and the Second Respondent shutting down the conversation (at para 26). As regards the Second Respondent, his own evidence was that he had a clear intention to intervene in the process at some stage. He stated that although he had concluded he should not have any involvement in the Claimant's application at the sift stage (para 19), in the event the application

was not rejected he stated he wished to reserve the option of bringing information to the attention to the person considering it (para 20). Further the Second Respondent had had a conversation with Ms Wolfe about the Claimant after the Chambers meeting on 19 March 2019 and effectively "marked her homework" by asking to see her marking sheet regarding the Claimant's application (statement at paras 24-25). Mr Flood further submitted that in this respect the Second Respondent's evidence might contradict his email to Mr Chowdhury on 20 March 2019 where he stated that he did not read the Claimant's paper application.

16. Turning to the Respondents' alternative application for a deposit order, Mr Flood submitted that there was evidence the Second Respondent had strong adverse views about the Claimant, that he sought advice from the BCEES with the view to sharing them with the person deciding the Claimant's application and received a response that there was no ethical bar to him so proceeding. The Claimant's application was thereafter dismissed. Those were primary facts from which the Claimant could invite the Tribunal to draw an inference of discrimination under section 136 of the Equality Act 2010 and switch the burden of proof onto the Respondents to show they had not contravened the Act. If I considered such a plea could reasonably be made, then it could not be said the claims had little reasonable prospect of success and a deposit order was appropriate. However, if I were minded to make a deposit order then although the Claimant had not put in evidence of his means, Mr Flood was instructed to say that the Claimant was undertaking a pupillage with Reeds Solicitors and Chambers from which he receives a net income of £1,147.92, that he and his wife have a 4-week old baby and that his wife receives weekly statutory maternity pay of £151.20.

Conclusions

17. I am not satisfied that the case-law to which I was referred by Mr Sutton QC articulates a recent change in the law to the striking out of discrimination cases. In any event it seems to me that while there is no rule that prohibits the striking out of discrimination cases the authorities are clear that that course of action is only appropriate in the very clearest circumstances, such as where the claim is entirely fanciful or entirely speculative and there is no reasonable prospect of the facts required to establish liability from being established at trial. A claim may satisfy that criterion (of being entirely fanciful or entirely speculative) where it is based on an ostensibly innocent sequence of events leading to the act complained of and the claimant cannot point to some reason or piece of evidence capable of suggesting that things are not what they seem. **Ahir v British Airways plc** is such an example. It concerned the strike out of claims alleging discrimination in relation to disciplinary proceedings and the claimant's consequent dismissal. In bringing such claims the claimant was submitting that an anonymous letter sent to the respondent, stating that the claimant had not been made redundant from his previous job (as he had said) but had been dismissed for gross misconduct, was a concoction. Furthermore, as Judge Eady in the EAT pointed out, in order for the claim to succeed the claimant would have had to show that the six separate managers who considered the letter warranted the disciplinary

action that led to the Claimant's dismissal had each permitted the background issues of the Claimant's protected acts to taint their decision making, even though there was no evidence the managers were even aware of those issues.

18. The present case is materially different from **Amir v British Airways**. Although it is true the Claimant has to show that Ms Wolfe permitted (or was persuaded by the Second Respondent to permit) the background issues of the Claimant's protected acts and/or perceived rudeness to the Hertfordshire Constabulary to taint her decision making in circumstances where is there is no evidence she was aware of those issues, the Claimant can point to a piece of evidence that gives him "reason…to suppose that things are not what they seem" (per Underhill LJ at [19]) namely the Second Respondent's exchange of email with the BCEES. That email exchange shows, first, the Second Respondent had formed an unfavourable view of the Claimant, secondly, that he wished to know whether he could ethically convey that view to the person considering the Claimant's application for pupillage and, thirdly, that he was advised he could do so. Although both the Second Respondent and Ms Wolfe say in their witness statements that in the event the Second Respondent did not convey his views to her (at least prior to her decision to reject the Claimant's application), given the e-mail evidence that the Second Respondent sought advice about doing precisely the thing he says he did not do, the witness statements cannot simply be assumed to be impregnable and the Claimant is entitled to the opportunity cross-examine the Second Respondent and Ms Wolfe in respect of them. While I regard the Claimant's reasonable chances of proving his case as highly doubtful, I am not satisfied that he has no reasonable chance of doing so. I therefore reject the Respondents' application to strike out his claims.

19. Turning next to the Respondents' application for a deposit order, Mr Flood submitted the evidence of the Second Respondent's email communications with the BCEES, together with the fact of the rejection of the Claimant's pupillage, were primary facts apt to give rise to inference of discrimination and reverse the burden of proof and, if that was so, it could not be appropriate to make a deposit order.

20. I do not accept the basis of that submission. Given the Second Respondent did not himself reject the Claimant's application, the lack of evidence that he conveyed his view to Ms Wolfe prior to her marking the Claimant's application, the statistically very low number of successful pupillage applications, and the number of credible reasons why the Second Respondent may have held negative views about the Claimant unconnected to Claimant's discrimination claim against Hertfordshire Constabulary or his perceived rudeness to them (see above at paragraph 11), I do not accept that the facts relied on by Mr Flood would of themselves give rise to an inference of discrimination and reverse the burden of proof pursuant to section 136 Equality Act 2010.

21. Indeed, those same considerations set out in the preceding paragraph lead me to the conclusion that the Claimant has little reasonable chance of either of his claims succeeding. In order to do so he has to establish that the

witness evidence of both the Second Respondent and Ms Wolfe is untruthful about the core issue as to whether the Second Respondent communicated his views of the Claimant to Ms Wolfe, and that her marking of the Claimant's pupillage application was tainted because of that. In her witness statement Ms Wolfe provides a detailed explanation for the marks she gave the Claimant and while the Claimant in his witness statement contests the fairness of her marking, and will be entitled to cross-examine Ms Wolfe about it, on the face of that evidence the marks do not appear to be without foundation. Finally, I note that to succeed at trial the Claimant will also have to establish that the Second Respondent's negative views of him were related to the fact of his having brought a discrimination claim against Hertfordshire Police and/or his disability, rather than the other credible and non-discriminatory reasons that the Second Respondent relies upon.

22. In the light of the above I conclude it is appropriate to exercise my discretion under rule 39(2) and order the Claimant to pay a deposit. Since there does not appear to be any significant difference between the prospects of his claim for victimisation and that for discrimination arising from disability (and none was suggested to me), and since there is considerable overlap of evidence and argument between the two heads of claim, I see no purpose in making separate deposit orders for each claim. I therefore consider that the Claimant should be ordered to pay a deposit of £150 as a condition of continuing to advance both claims. The amount of the deposit is relatively low because of the Claimant's relatively modest means and the recent increase in his family responsibilities. The deposit must be paid within 21 days.

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Employment Judge S Moore

Date: 16/7/21

Sent to the parties on: ....

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For the Tribunal Office