EMPLOYMENT TRIBUNALS

Claimant: **Mr M Ibeziako**

Respondent: **Staff Call UK Limited**

HELD in Hull **ON: 4 May 2022**

BEFORE: Employment Judge Wade

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr G Mahmood (counsel)**

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 4 May 2022, the written record of which was sent to the parties on 9 May 2022. A written request for written reasons was received from the claimant. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 4 May 2022 are repeated below:

JUDGMENT

1. By Consent: the claimant's March application for wasted costs against the respondent's solicitors shall be determined separately and with due notice and directions, if pursued.
2. The claimant's application to strike out the response on jurisdictional grounds is misconceived and is refused.

3. The claimant's applications for deposit orders in respect of matters a) to e) of today's document are refused: (a) (b) and (e), although arguably in the amended response, cannot be shown to have little reasonable prospects of success; (c) and (d) are out with the amended response and cannot properly be the subject of a deposit order; if I am wrong I do not consider that the contentions can be said to have little reasonable prospects of success.
4. The respondent's application to strike out the claim because it has no reasonable prospects of success and/or is vexatious is refused: the claim does not have "no reasonable prospects" of success.
5. The respondent's application for a deposit as a condition of continuing with the claim is refused: the claim can be said to have little reasonable prospects but I do not exercise my discretion to make a deposit order (a final hearing is listed on 25/26 May)
6. The claimant's application to amend his claim to reference Section 56 of the Equality Act 2010 is permitted: it is a helpful reference to the applicable interpretation provision.

REASONS

Introduction

1. The claimant brings Equality Act victimisation complaints. Today's preliminary hearing was listed following a letter to the parties in January of this year which included the following directions from the Regional Judge:

   "The claimant's application for a deposit order against the respondents at paragraphs 15-19 of his document dated 15 December 2021 will be listed for hearing.
   The respondents' application dated 16 December 2021 for the claim to be struck out or for a deposit order against the claimant will be listed for hearing.
   The above applications will be listed for hearing by CVP on the first available date before any Employment Judge with one day allowed.
   The Tribunal will consider any further or outstanding matters of case management at the Preliminary Hearing after it has dealt with the above applications.
   The full merits hearing of the case will remain listed for two days on 25 and 26 May 2021. The claimant's suggestion that the case can be completed in one day is unrealistic."

2. The original CVP hearing directed above was postponed and an application that it be heard in person, rather than by video link, was granted. It is unfortunate that it takes place today, only three weeks before a final hearing is directed to take place.
3. I have been assisted today by being able to read a great deal of documentation provided by the parties. That includes a skeleton argument on behalf of the respondent in support of their applications, and a document which the claimant sent this morning to the Tribunal and the respondent, responding to that skeleton argument.

4. The claimant's document commenced by saying that he would use this opportunity to withdraw his application for a deposit order, which was made on 15 December 2021, "and replace it with this current application for a deposit order stated below ".

5. I was asked to consider this document in conjunction with the claimant's witness statement for today, Ms Milner's statement, and the skeleton arguments and other information filed. The respondent had also prepared a core bundle of some of the papers in the case, to which the claimant had objected for a number of reasons. I initially read the pleadings from the Tribunal's file only, but it then became apparent that the claimant was happy for me to refer to the core bundle, during the hearing, which contained evidence to be heard in three weeks time before a full panel. I was also invited to consider documents provided by the claimant and I was happy to do so.

6. The claimant's remaining allegations in this case (a good deal having been withdrawn) are very succinctly put. There are alleged to be three complaints that the respondent victimised him, relying on the claimant's application for a witness order dated 7 July 2021 in a different case, and a discrimination questionnaire which the claimant provided to the respondents and its manager, Ms Milner, on 3 August 2021, Both these matters being said to be protected acts and there was not a great deal of discussion today about whether they were, or were not, protected acts. We proceeded today on the basis that they were.

7. The detriments that the claimant says arise from the doing of those protected acts, confirmed in case management orders in December, were that the respondent:

    1.1 Refused to complete an ACAS questionnaire;

    1.2 Refused to appoint the claimant to a job for which he applied;

    1.3 Refused to give the claimant an appeal against the refusal in respect of his job?

8. The respondent's pleaded resistance to these allegations of victimisation is in its amended grounds of response which sets out the background to the claims. One has to disregard its pleading about direct race discrimination because those allegations are no longer before the Tribunal. The response goes on simply to say that no admissions are made about whether a protected act has been done. The respondent denies the claimant has been subjected to any unlawful detriment. It takes issue with whether the matters about which the claimant complains about are in fact arguably detriment, and goes on to suggest that it will say that the acts were not carried out because of the protected acts, even if they are established.

9. The context is that the respondent places carers with hirers. It operates as an employment business. The claimant had previously secured work through the respondent but at the material time had been without work via the respondent, for some time, and had made a new application. His real case is that the respondent's refusal to provide him with work seeking services was artificial: in his words, "the manner by which the second respondent made the decision not to select the claimant as job applicant on 9 August 2021 by using artificial created re-hire policy and also using outdated signed policy documents dated

21 December 2018. That did not reflect up to date employment details the claimant had with the second respondent on 16 September 2019." The claimant had latterly operated through a service company, and did not bring his case on the basis that he was seeking employment, rather than he was seeking work finding services. He considers that the response must be struck out, to the extent it seeks to rely on a status which he did not hold, because the respondent has no reasonable prospect of showing that he was previously an employee and/or that its policy should apply to "non employees". This application has no merit. It overlaps with point a) below. The status of the claimant is described in the response as background. It is not apt for strike out without evidence and the Tribunal will make findings about it.

10. The claimant says the manner in which the decision was made not to provide work finding services to him by Ms Milner on behalf of the respondent is an act of victimisation.

11. I also record that there is an application outstanding from the claimant for a wasted costs order against the respondent's advisors, on the basis that it was unreasonable conduct, in essence, to advise the respondent to defend the claim, and that is a matter which if pursued, must be pursued upon proper notice to the respondent's advisors to enable them to seek independent legal advice and notify their insurers if so advised, and also on the basis that if it is considered to be arguable, it should be listed for a hearing with those safeguards in place.

12. The claimant's renewed application for a deposit order seeks to address a number of matters in the respondent's case labelled, a) to e) in his written document at page 8.

13. The first assertion is that the respondent has little or no reasonable prospects of success in showing that the claimant was or has been an employee or worker of the respondent within the Equality Act definition section 83(2) at the relevant time. His case is that the respondent was providing work finding services for the purposes of section 55, hence he added an application to formalise his position by reference to the relevant section, and employee/worker status had no bearing on this case.

14. My understanding of the claimant's point is that if the respondent has used a framework, its procedure, for re-hiring employees and workers, as opposed to someone seeking to use their work seeking services, it was wrong to do so, as he was not a former employee, nor was he aspiring to be an employee. Therefore it must have victimised him/and or its reason is a sham. Employee or worker was not his status at the material time and he did not seek that status.

15. Self evidently, the respondent's case is **not** that the claimant had employment status when it declined to find him work. Paragraph 9 of the respondent's amended response, says that the claimant had worked with clients and worked with the respondent in a number of different ways over a period of two years. That is repeated in Ms Milner's statement for the main hearing. The claimant seeks to say this is in some way factually incorrect. He says that at e) of his application today as well: either it is factually incorrect and/or a misinterpretation of events and/or that the respondent was not entitled to rely

on worker policies for somebody who had different statuses across that period of time.

16. Both of these contentions, that is a) and e) have no bearing on the essential question that is going to be before the Tribunal. That essential question is, why did the respondent refuse to provide work seeking services for the claimant when it did? The way in which it had previously engaged the claimant's services is neither here nor there, in the context of an organisation that provides personal care through others to clients and service users. There are a number of different models and the claimant may have operated with all of them with the respondent. The form of engagement is unlikely to have any bearing on why the respondent declined to find work for him again with its clients. That was the nature of the request that he was making. To suggest that the respondent, in setting out that background and relying on its worker/employee re-hire policy, as its reason for refusing that request, has no reasonable prospect of success or little reasonable prospect of success, fundamentally misses the point.

17. As far as the allegation or ground b) is concerned, that the respondent had received six allegations made against the claimant by hirers, it is said by the claimant and developed today, that those are said to be bogus or sham complaints: they were not real, they were made up by the respondent.

18. In the materials provided for me is the evidence that is going to be before the full Tribunal if the case proceeds. It is clear to me that this is a triable issue. There are clearly materials about which the Tribunal will have to make findings. There is evidence from Ms Milner about those matters too; and there will be evidence from the claimant. There is a letter to the claimant in October 2020, which refers to complaints having been made and it is instructive to me that he did not allege bogus complaints and/or sham complaints in his original pleading. His pursuit of that matter now is a development of his pleaded case, having had the benefit of the disclosure and the trial bundle which will be before the full Tribunal.

19. Simply put, the respondent puts its case on the basis that there were six previous complaints against the claimant and that informed its decision not to undertake work seeking services for him. Without scrutiny at a hearing, that cannot be said to have no or little reasonable prospect of success as a defence. It is clearly arguable and indeed I will come on to deal whether its prospects of success are higher than that in due course.

20. As far as ground c) is concerned, this is a new assertion that the respondent's contention in its application that the claimant is a vexatious litigant has no reasonable or little reasonable prospects of success, such that I should strike out or deposit that contention. I cannot imagine a world in which anything or everything that is said by a party during the Tribunal process becomes subject to some sort of test of whether it is arguable, such that it might be depositable or liable to strike out. That would be a very difficult way in which to dispose of cases fairly. I understand it as the claimant's response to the respondent's suggestion that he is a vexatious litigant. I will come on to that in due course, but in short there are grounds for the respondent to assert it, and I would not in any circumstances, say that it has little reasonable prospects of success in all the circumstances. Nevertheless Rules 37 and 39 (strike out and deposit) apply to parts of claims and responses – the respondent has not included this

assertion in its pleaded response to the victimisation complaints. The claimant's application cannot therefore succeed.

21. As for d), the claimant says case number 1800045/2020 is the subject of an appeal; the respondent cannot therefore suggest this it was a vexatious claim. If it the respondent does suggest it, that is a matter which has little prospect of success or no reasonable prospect of success. Again I cannot determine on a summary basis, given the history of proceedings, that **this or any other** claim is vexatious. It is a high bar to establish that. The claimant identifies himself as a discrimination activist and I will come on to that in due course. As far as an application that I strike out or deposit the respondent's assertion, this has to fail for the same reasons as contention c). I have no such power. All I can do is determine the respondent's application.

22. For these reasons the claimant's application for a deposit order or strike out of the respondent's defence is dismissed. This is a very discreet and contained claim which is properly set down for two days, because it contains clear allegations that always were very clear and it contains a clear defence which is very contained. Matters will not, or ought not, spill over beyond the core issue of why did the respondent decline to provide work seeking services for the claimant at the time that it did.

23. I then come on to deal with the respondent's application for a deposit order and indeed a strike out of the claimant's claims. This application was set out in a letter and fully and diligently in the respondent's skeleton argument, helpfully directing me to the right law. It was put on a number of different bases.

24. Making the best use of the time, entirely properly, the strike out application on the basis of the claim being vexatious was less vigorously pursued, and properly so, in circumstances in which the claimant describes himself as a discrimination activist who has previously brought claims against the same respondent. It will be for a full Tribunal to find facts such that it can properly draw a distinction between someone who is actively seeking to uphold the spirit and provisions of the Equality Act and a person who is seeking to bully or harass an employer by vexatious Employment Tribunal claims. That may be a fine line to draw, but it is one which is best addressed in the circumstances of this case by a full hearing, and then, if the claims fail, through a costs application, with the benefit of hearing evidence from the claimant about his circumstances and thought processes. On this occasion I focus on the pleaded merits of the case - I indicated to the parties that that is what I would do. I cannot find on the pleaded cases alone and the fact of previous claims that the claimant is a vexatious litigant and I do not do so. It may be unlikely that complaints about him while working have been made up, bearing in mind the documentation relating to them, but that is best explored through the evidence.

25. As far as my assessment of the merits without hearing the evidence, I can and should consider inherent implausibility. This is a case in which there is one core allegation - a refusal to provide work seeking services, or as the claimant puts it, the manner in which the respondent made the decision not to select the claimant as a job applicant by using [sic] artificially created rehire policy.

26. His assertion, then, is that the re-hire policy is also a sham. To assess that, a Tribunal will be assisted, typically, by hearing the evidence of the respondent

about its rehire policy, seeing the policy itself (which was before me today) and hearing what is said about how that was applied in this case. The Tribunal will also need to assess the evidence of complaints, that the claimant says now, are bogus, and never raised at the time of his service with the company. He says, at the time, he was engaged as a subcontractor, and one would therefore expect those matters to be raised company to company, as it were, and that they were not.

27. These are matters about which the claimant and Ms Milner should give evidence on oath, and that evidence would come to be scrutinised and questions could be put in cross-examination. I have had a flavour today of the sorts of questions that will be asked, and I have had sight of the extent to which those documents, the six complaints within the main bundle, will come to be examined and scrutinised. The claimant now says, in terms, that those complaints were bogus.

28. On the main allegation of detriment, I am not in a position today to say that there are no prospects of a Tribunal drawing an inference, for example, that complaints not subject to contemporaneous documentation and reporting, other than in reported discussions with the claimant, were manufactured or exaggerated in response to something else, or another allegation or another case. I cannot say there are no reasonable prospects of that, but having been able to have a cursory look at some of that documentation, I consider that it is very unlikely that the Tribunal will assess those complaints as bogus or sham.

29. It follows that in the care sector, taking judicial notice of the regulatory rigor of that sector, it is very unlikely that the respondent is going to be found to take other matters into account, namely a previous application for a witness order and the claimant's request for a reply to a questionnaire. I consider it unlikely, because it is inherently implausible where bona fide complaints exist, that other matters were a material influence on Ms Milner's decision making, rather than consideration of a policy which ostensibly seeks to protect service users from candidates or workers who for various reasons may not be appropriately deployed.

30. I do consider then, that there are little reasonable prospects of the Tribunal finding that the protected acts were a significant influence on this core allegation. I do not say that there are no reasonable prospects because when matters are discussed in detail one can never really know for certain how the evidence will unfold, and what is going to be said, when the parties are challenged. That was not to take place before me today.

31. As to the other two allegations of detriment, I do think there are real difficulties in suggesting that when a full response is given for "the reason why" work is not to be sourced for the claimant, that in not offering an appeal and not offering a reply to the questionnaire, the claimant has somehow suffered some kind of detriment, given the timescales apparent in this case. The obvious reason why those two things were not done is because a full reply was given, drawing a line and explaining why work seeking was not to be provided for the claimant. I assess these allegations as having little reasonable prospects of success, both because of the difficulty in showing detriment, but also because of the obvious and entirely likely "reason why" asserted by the respondent.

32. Having reached those conclusions today, imposing a deposit order on the claimant involves an exercise of discretion. I have heard about the claimant's means and I am satisfied that he could pay a small amount for each of those three complaints as a condition of pursuing them. However, I do not consider it practicable in this case to make that order because the administrative burden this close to a final hearing is unwieldy and creates unnecessary uncertainty for the parties. Payment cannot be made electronically, and a postal order or cheque to the finance office in Bristol requires both to be processed through the post, and to be recorded on the system, before it can be known whether the complaints can be struck out for non payment. The normal period for payment is 28 days and that cannot be ordered here without postponing the final hearing. In the circumstances my assessment of the merits of itself puts the claimant on a costs warning, in effect. If he continues to pursue the case on the basis that he does and it does not succeed for the reasons that I have explained, then he may be subject to a costs application from the respondent, which will come to be decided separately.

33. There is one further matter of case management that I do need to address. The claimant has applied to identify section 56 of the Equality Act in his pleading in addition to section 55, which is entirely proper because, as I have said, it is an interpretation section. There is no prejudice in permitting that amendment and I do permit it. If matters proceed to the final hearing it will assist the Tribunal.

Employment Judge Wade
Date 6 June 2022

REASONS SENT TO THE PARTIES ON
Date 23 June 2022