EMPLOYMENT TRIBUNALS

Claimant: Mr N Mendy

Respondents: 1 Motorola Solutions UK Ltd
2 Motorola Solutions Inc
3 Mr T Bell

Heard at: London Central (by CVP) **On:** 13 January 2023

Before: Employment Judge H Grewal

Representation

Claimant: In person

Respondent: Mr L Harris, Counsel

JUDGEMENT

1 The Claimant's application to strike out the response is refused.

2 The claim is struck out.

REASONS

1 This open preliminary hearing was listed on 14 November 2022 to consider:

(a) The Claimant's application to strike out the response in this case as having been presented out of time;
(b) An application that the Claimant was going to make to strike out the response on the basis that it had no reasonable prospects of success;
(c) Any application that the Respondent might make to strike out the claim in this case; and
(d) Whether to consolidate this claim with the Claimant's existing claims which have been listed to be heard between 13 June and 4 July 2023.

2 On 5 December 2022 the Claimant applied to strike out the response on the grounds of the Respondent's unreasonable, vexatious and scandalous conduct and because the response had no reasonable prospect of success.

3 On 28 November 2022 the Respondent applied to strike out the claim on the grounds that the Tribunal had no jurisdiction to hear it and/or it had no reasonable prospects of success and, in the alternative, for a deposit order.

4 On 15 December 2022 Regional Employment Judge Freer refused the Claimant's application to strike out the response on the grounds that it had not been presented in time.

5 I indicated at the start of the hearing that as that application had already been dealt with, I would not be dealing with it. The Claimant applied to adjourn the preliminary hearing on the grounds that he wanted to apply for reconsideration of and to appeal that decision. The remaining applications were not in any way dependent on the outcome of that application and as everyone was ready to proceed with those applications I saw no good reason not to proceed with them. I refused the Claimant's application to postpone the preliminary hearing.

6 The claim form in this case was presented on 19 August 2022. Early Conciliation ("EC") against each of the Respondents was commenced on 19 July 2022. Two of the EC certificates were granted on the same day, and the third one was granted on 11 August 2022. The Claimant was employed by the Respondent from 16 July 2018 until his dismissal on 5 May 2020. In 2020 the Claimant presented complaints of race discrimination, whistleblowing detriments and automatic unfair dismissal in respect of his employment and the termination thereof. In the present claim the Claimant said that he was complaining of victimisation and harassment under the Equality Act 2010.

7 In his Grounds of Complaint the Claimant set out a long narrative, a large part of which related to Subject Access Requests ("SARs") that he had made. He said that he made the first SAR to the Second Respondent ("R2") around 11 November 2019. He said that R2 had delayed in responding to the request and that the data had finally been supplied in June 2021, although some data was still missing and some of it had been redacted. Around May 2021 he had made a SAR to his mortgage unemployment insurer and had discovered that his claim had been declined as a result of false information being given to them by the First Respondent/Carole Lawrence. He had made another SAR to R2 on 11 June 2021. R2 had said that it had collected 4,776 documents which it would supply to him but that its solicitors would need to advise as to what data they could share with him and what needed to be redacted. He had not agreed to the solicitors being involved and the data had not been supplied. On 14 May 2022 he had asked R2 and Mr Bell ("R3") again for the 4,776 documents but had maintained that the Respondents' solicitors should not have access to the data. On the 19th Mr Bell had refused his request and had threatened, bullied, harassed and made false allegations against him.

8 The Respondent, in its Grounds of Resistance, said at paragraph 2.5 that it understood the Claimant to be complaining of victimisation and harassment about (a) the Respondent's handling of his data subject access requests and (b) the provision of information by R1 to his mortgage insurers. It said that the Claimant had made three data subject access requests under the Data Protection Act 2018 to access

certain personal data held by R1 and R2. All the SARs were dealt with by R2's US data privacy team which handles all privacy issues Group wide. It then dealt in detail with each of the SARs. It said that first request had been made on 11 November 2019 and had been responded to in full on 14 February 2020. A second request had been made on 14 May 2020 and had been responded to in full on 15 June 2020. The Claimant had on 30 May 2021 made an additional request for a large amount of his personal data held by R2. R2 responded that due to the size of the searches, they needed to engage legal counsel and a third party provider to undertake review and redaction of the documents. The Claimant responded that he did not give permission for his data to be shared with any third parties. In June 2021 R2 informed the Claimant that it had collected 4,776 documents in response to his request and was ready to provide them to its solicitors for review and redaction. On 30 June 2021 the Claimant emailed R3 re-stating his position that R2 should not share the data with a third party. R2 maintained its position and no data was provided to the Claimant. Paragraphs 32 and 33 of the Grounds of Resistance dealt with the Claimant's request on 14 May 2022 and Mr Bell's response to it on 19 May 2022. It stated that Mr Bell had said that R2 would be exercising its right of refusal on the basis that the request at that time was manifestly unfounded and/or excessive. He said that In reaching that decision R2 had taken into account a number of factors, including the fact that the third request repeated the Claimant's previous requests, an unreasonable interval had elapsed since the request had first been made and that the Claimant would obtain all the requested information via his rights of disclosure in the ongoing litigation. It stated that the data subject access requests had been handled appropriately and in accordance with the data protection legislation and the Claimant had, therefore, not been subjected to any detriment or unwanted conduct. Furthermore, they had not been influenced by the fact that the Claimant had bought a grievance and/or an Employment Tribunal claim.

9 At the preliminary hearing the Claimant clarified, and repeated several times, that his complaint of victimisation and harassment in this claim was only about Mr Bell's refusal on 19 May 2022. He said that all the other matters set out in his Grounds of Complaint were background and setting out the history.

10 Both parties had provided documents for the preliminary hearing and I looked at the documents which they asked me to look at and some others. I considered the following to be relevant to the applications before me.

10.1 The final communication in respect of the 4,776 documents that had been collected in response to the Claimant's SAR in June 2021 was an email dated 2 July 2021 from Mr Bell to the Claimant. In that email Mr Bell said,

> "*I can see from correspondence on the file, that your request has been dealt with to the point of having collected all data within scope, I can also see that, you contacted our privacy team and stated that you did not wish your data to be shared with any third parties (your email of 9th June 2021). This effectively means that, to respond to your request, we would have to conduct the review/redaction process in-house. Given the size of the data set and the fact that outsourcing this part of the process is standard practise* [sic] *not just for us but for many data controllers (particularly in response to requests involving a large data set) I do not consider this to be a reasonable request. I am satisfied, therefore, that at this point our hands are tied in respect of being able to progress our response to your request.*

I believe Osborne Clarke have provided assurances to you in respect of safety/security of your data in their hands but, to also provide additional reassurance – the team handling your data subject access request at Osborne Clarke (being our company lawyers) are a separate team to that handling the litigation

If your position has changed on this front do let me know and I can immediately action your request – the data is safely stored so that we're ready to move forward as quickly as possible."

He concluded by reminding the Claimant of his right to refer the matter to the Information Commissioner's Office ("ICO") to make an appropriate determination.

10.2 The next communication on this issue from the Claimant was his email to Mr Bell on 14 May 2022. In that email he said,

"*You (the company) confirmed on June 14, 2021 that you have collected my personal data within scope of your data subject access request and that the data consists of* ***4,776 documents****.*
Could you directly send me the documents in the way you intend to do (even if I disagree as stated before), and I will take it from there as my position remains the same. That will be a good start.

In any event, I reserve all my rights."

10.3 Mr Bell responded on 19 May 2022. I set out his response in full as that is the subject-matter of the Claimant's complaint of victimisation and race-related harassment. Mr Bell responded,

"*We respond to your email dated 14 May 2022 requesting that we now respond to you data subject access request originally submitted on 30 May 2021.*

On 4 June 2021 we wrote to you advising you that we were ready to respond to your request via our privacy lawyers at Osborne Clarke who were instructed to undertake the review and redaction process. You advised that you did not consent to your data being provided to Osborne Clarke. We were, therefore, unable to further process your request.

You have now, some twelve months later, requested that we resurrect your DSAR on the basis of the terms we set out last year. By this we assume you mean using the services of Osborne Clarke. This is a complete turnaround from your previous position.

Having given this due consideration, we are exercising our right of refusal in respect of responding to this request. This is on the basis that your request is manifestly unfounded (is being used to harass the business with no real purpose other than to cause disruption) and/or excessive (in that it is clearly and obviously unreasonable). In reaching this decision we have taken into account the following:

- *Your request does not relate to a completely separate set of information but repeats, in its entirety, the previous request;*
- *The period of time that has elapsed since the request was first made – this being an unreasonable interval that has since elapsed;*

- *There will be no detriment to you in refusing as you are able to access the information that you seek via your rights of disclosure in respect of the ongoing litigation;*
- *Your previous unreasonable and offensive conduct in respect of the original DSAR (including to Osborne Clarke who would have to handle the review/redaction process for us) and our reasonable approach taken in response in endeavoring to resolve the issue at the time.."*

He reminded the Claimant again of his right to complain to the ICO.

10.4 The Claimant complained to the ICO (I did not have a copy of his complaint). On 24 November 2022 the ICO wrote to the Respondents that it had received a complaint from the Claimant that they had not properly responded to his subject access request, that they held incorrect information about him and that they were sharing information with third parties. On 9 December 2022 Osborne Clarke, the Respondent's solicitor, sent the ICO the response to the Claimant's complaint. It set out the history of the Claimant's SARS and all the communications that had passed between the Claimant and the Respondents between 30 May 2021 and 19 May 2022 in respect of his last SAR.

11 On 12 December 2022 the ICO responded that it was their view that Motorola had "*complied with their data protection obligations and have provided the subject access requests (SAR's) to Mr Mendy as per guidelines."*.

12 The ICO provided the Claimant a copy of its correspondence with the Respondent. On 11 December 2022 the Claimant wrote to the Respondents to say that he disagreed with the letter of 9 December 2022 and asked for more information.

The Law

13 Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Procedure Rules) provides,

> "*At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or a response on any of the following grounds –*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *…"*

14 Rule 39 of the Procedure Rules 2013 provides,

> "*(1) Where at a preliminary hearing … the Tribunal considers that any specific allegation or argument in a claim or a response has little reasonable prospects of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."*

15 In **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603** Maurice Kay LJ stated, at paragraph 26, then when considering an application to strike out a claim on the grounds that it has no reasonable prospect of success, what is in issue is whether the claim *"has a realistic as opposed to a merely fanciful prospect of success."* He continued, at paragraph 29,

> "*It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."*

16 In **Anyanwu v South Bank Students Union [2001] ICR 391** Lord Steyn said,

> "*For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and the plainest of cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society."*

Lord Hope of Craighead agreed with the view that discrimination issues of the kind raised in that case should as a general rule by be decided only after hearing the evidence but went on to say,

> *Nevertheless I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail."*

17 In **Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425** Underhill LJ said,

> "*It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act".*

18 In **Shamoon v Chief Constable of the RUC [2003] IRLR 285** the House of Lords held that in order for a disadvantage to qualify as a "detriment" the tribunal lust find that by reason of the act or acts complained of a reasonable worker would or might take the view he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment."

The Claimant's application to strike out the response

19 The Claimant argued that the response had no reasonable prospects of success because the Respondents in the response had responded to claims which he had not made but had not responded to the only claim that he had made, namely Mr Bell's refusal on 19 May 2022 to grant his data subject access request and him threatening and making false allegations against the Claimant in that refusal. It is correct that the Respondent did respond to a number of claims which it believed that the Claimant was making in his claim form because it was not clear from the claim from about

which matters he was complaining. It is not correct that the Respondent did not respond to the only claim which the Claimant has clarified that he is making. One of the matters that it understood the Claimant to be complaining about was the Respondents' handing of his data subject access requests, one of which was the request originally made in May 2021 and then repeated on 14 May 2022. It set out at paragraphs 32 and 33 the request made on 14 May 2022 and Mr Bell's response to that on 19 May 2022 (including the reasons that he gave for refusing it). Its legal defence set out at paragraph 39 applies to all the claims it understood the Claimant to be making, including the SAR refusal on 19 May 2022. Contrary to what the Claimant said, the Respondent has responded to the only claim that he is pursuing and has set out its defence to it. It cannot be said that that response has no reasonable prospects of success. For the reasons given above, I refused the Claimant's application to strike out the response.

The Respondent's application to strike out the claim

20 The Respondent's application pursued at the hearing was on the basis of the claim as clarified by the Claimant. It argued that the claim had no reasonable prospect of success for the following reasons. Having regard to the circumstances in which the refusal was made and the conclusions of the ICO (having been made aware of those circumstances), there was no reasonable prospect of the Claimant being able to establish that the refusal had been a "detriment" and/or unwanted conduct which had had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. In considering whether it had that effect the Tribunal would have to take account the Claimant's perception, the other circumstances of the case and whether it was reasonable for it to have that effect. Furthermore, the Claimant had not put forward any basis for suggesting that the refusal was in any way linked to his race or the fact that he had done a protected act.

21 In considering the application I took into account the following matters. The facts, leading up to the refusal, are clearly documented and there is no factual dispute about what happened. It is not in dispute that the Claimant made a data subject access request at the end of May/June 2021 and that there were then communications between him, the Respondents and the Respondent's solicitors about the need for the solicitors to review and redact the documents in light of the large volume of documents. It is not in dispute that the Claimant objected to his data being shared with the solicitors. On 2 July 2021 the Respondents made it clear that, if that remained the Claimant's position, it could not provide him with the data and advised the Claimant of his right to pursue the matter with the ICO.

22 The Claimant did not pursue the matter with the ICO at that stage and did not bring a claim to the Tribunal in respect of the Respondent's failure to deal with it because the Claimant did not consent to its solicitors dealing with it. After nearly a year, the Claimant resurrected the matter with R2 and Mr Bell. His position in his particulars of claim is that he had not changed his position about the solicitors having access to his data. If that was the case, it is difficult to see what the point of resurrecting a matter that had already been decided a year earlier. The Respondents' response would have been the same as the year before for the same reason. On his case the refusal in May 2022 simply repeated the refusal of July 2021 and was not a new act of victimisation/harassment. Mr Bell understood him to have changed his position but refused it nevertheless for the reasons set out in his letter.

23 In November 2022 the Claimant complained to the ICO about the refusal on 19 May 2022 and the Respondent's wish to have the data processed by its solicitors. The ICO was told about all the communications that had passed between the parties between May 2021 and 19 May 2022. Its conclusion was that the Respondents had complied with their data protection obligations and had as acted "*as per guidelines."*

24 In circumstances where the Claimant took no action for a year after the initial refusal and where the IOC has found that the Respondents have not done anything wrong either by wanting the revision/redaction to be done by their solicitors or by refusing to resurrect the matter a year later, it will be extremely difficult for the Claimant to establish that a reasonable worker would in those circumstances take the view that he had been disadvantaged by the Respondent's acts or that it was reasonable for it to have had the proscribed effect on the Claimant.

25 Furthermore, the Claimant has not put forward any basis at all for suggesting that a white employee or someone who had not done a protected act, who had behaved in the same way as the Claimant, would have been treated any differently. The mere facts that the Claimant is black and/or has done a protected act and that Mr Bell refused his request on 19 May 2019 are not sufficient to establish a prima facie case of victimisation and/or harassment. The onus is on the Claimant to put forward some basis for proving that there is a causal link between the refusal and his race and/or the fact that he has done a protected act. He has not done so. I concluded that there was no reasonable prospect of the Claimant establishing a prima facie case of victimisation or race-related harassment.

26 Having considered all the above factors, I considered that the complaints of victimisation and race-related harassment about Mr Bell's letter of 19 May 2022 had no reasonable prospects of success.

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Employment Judge - Grewal

Date: 24/01/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

24/01/2023

FOR THE TRIBUNAL OFFICE