EMPLOYMENT TRIBUNALS

Claimant: Mr D Hoppe
Respondents: 1. Commissioners for HM Revenue and Customs
2. …
3. Government Legal Department

JUDGMENT

The claim is struck out.

REASONS

Relevant procedural history

1. By a claim form presented on 24 August 2021, the claimant complained that the respondents had subjected him to detriments on the ground that he had made protected disclosures. Section 47B(1) of the Employment Rights Act 1996 ("ERA") gives a worker the right not to be subjected to a detriment by any act (or deliberate failure) done by his employer on that ground.
2. The claim form named three respondents. For convenience, I shall refer to them respectively as "HMRC", "the Minister" and "GLD".
3. The claim form with which this judgment is concerned was accompanied by a four-page document (which I call "the Details of Claim"), expressly intended to supplement Box 8.2. The Details of Claim began with a brief summary of the litigation and continued:

> "…
>
> There are three matters further raised in this claim as a result of acts or failure to act by HMRC.
>
> 1. …
> 2. The second matter is the HMRC abuse of RIPA powers…
> 3. …."

4. I have already given the second allegation the label, "Detriment 2". For consistency I will continue to use this label. For reasons which I explain later, it is the only surviving part of the claim.

5. The substance of Detriment 2 is set out in this extract from the Details of Claim (with original emphasis).

> "Whilst I have not been able to progress the actions in the previous CMO to produce a complete list of evidence… a file had been created of much evidence.
>
> This file had not been looked at for some time and after an attack on my computer. Such file has now disappeared.
>
> It appears on balance of probability HMRC have and continue to abuse the powers held under RIPA to illegally access communications and that on balance of probabilities such as directly or indirectly been used to attack and destroy evidence…Such act of destroying evidence gathered has only become known since return from a short break on 29 July 2021."

6. I take "RIPA" to be a reference to the Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016.

7. A little earlier in the Details of Claim, the claimant explains his basis for contending that it was HMRC who attacked his computer. He relies on an appearance by the Chief Executive Officer of HMRC before the Public Accounts Committee in 2014. According to the Details of Claim, the CEO refused to give an assurance to the Public Accounts Committee that RIPA powers would not be used to keep whistleblowers under surveillance… No other facts are alleged that would be probative of this allegation.

8. The final two paragraphs of the Details of Claim set out the claimant's argument as to why GLD might be liable for the alleged detriments.

> "The actions identified have been on HMRC behalf but have been undertaken with the services of [GLD] who are also being cited as a respondent to explain their actions. Whilst it is legitimate for [GLD] to take actions to defend HMRC it is not legitimate for [GLD] to take any actions or failure to act which it knows to be illegal…"

9. By letter dated 17 January 2022, HMRC applied for the claim to be struck out on the ground that it was scandalous, vexatious and/or had no reasonable prospects of success. In the alternative, HMRC sought a deposit order and/or an Unless Order.

10. HMRC's proposed Unless Order included a requirement to provide answers to the following questions:

> "…
> (d) If it is alleged by the Claimant that his computer was illegally accessed by the First Respondent and evidence destroyed, the First Respondent requests that the Claimant be asked to identify: (1) when; (2) what files he alleges were tampered with and in this respect was it more than his "evidence file" and if so what did it contain?

(e) If the Claimant's case is that a single file relating to these proceedings has disappeared, please provide the name of the file, and where it was stored on his computer.
(f) The evidential basis that this was an "attack" as opposed to a computer malfunction; and
(g) What basis the Claimant has for alleging that the attack was perpetrated by [HMRC]."

11. GLD made a strike-out, deposit and Unless Order application of its own. This was sent to the tribunal on 25 May 2022.

12. I considered these applications, and others, at a preliminary hearing in public on 10 June 2022. Three documents of mine record what happened at that hearing and afterwards. The documents are two case management orders and my reserved judgment, sent to the parties respectively on 13 June, 8 August and 25 October 2022. In short summary, the claimant did not participate in the hearing, but was given an opportunity to request a further hearing before me, and two opportunities to make written representations. He provided written representations which I took into account.

13. The claimant has a mental health condition which affects his ability to participate in hearings. I was nevertheless satisfied that the claimant had had a fair opportunity to make representations, for reasons that my three documents explain.

14. In my reserved judgment, I struck out the claimant's claim against the Minister. As against HMRC and GLD, I struck out the whole claim with one exception. The exception was Detriment 2. I deferred my decision about Detriment 2 to give the claimant the opportunity to provide further information in writing.

15. The reserved judgment was accompanied by written reasons. This is how the written reasons explained my decision so far as Detriment 2 was concerned:

"

120. Detriment 2, as I discuss in more detail below, is essentially an accusation of a crime. Here, both respondents ought to be considered separately. It is one thing for the claimant to try and prove that someone at HMRC hacked into his computer. It adds another layer of difficulty to his case to try and show that HMRC enlisted the help of government lawyers to do it for them. The claimant relies on various background facts in support of his theory about who perpetrated the criminal act. If those background facts point to any Government agency at all being responsible for the claimant's loss of data, they might implicate HMRC, but do not appear to implicate GLD.

…

Conclusions – Detriment 2 – HMRC

143. Detriment 2 allegedly consisted of HMRC allegedly attacking the claimant's computer causing him to lose a file of evidence.

144. There is a central core of disputed fact here. Did HMRC do the alleged detrimental act or not?

145. For this part of the claim to succeed, the claimant will need to prove:

145.1 That his computer was hacked, as opposed to merely malfunctioning; and

145.2 That the hacker was HMRC, or someone acting on HMRC's behalf.

146. HMRC seek an Unless Order in relation to this allegation. As HMRC put it, the claimant has accused them of a crime with seemingly very little evidence in support. As a minimum, they argue, the claimant must provide the full factual basis for his accusation at the outset. Not only have they set out the information they require from him, but they argue that the claimant's failure to provide it should result in the automatic dismissal of this part of his claim.

147. In my view, an Unless Order would not help to achieve the overriding objective. My concern is that it would lead to satellite litigation about whether the claimant had complied with the order or not. In particular, if the claimant were at some later stage to provide information (for example in his witness statement) that ought reasonably to have been provided in answer to the Unless Order, what would that mean for his claim? Would it be automatically dismissed or not?

148. I do, however, consider that the claimant should be required to provide the full factual basis of his allegation now. I will defer consideration of the prospects of success until the claimant has had the opportunity to provide it. If he does not answer the questions posed by HMRC, I may draw inferences from his failure when considering whether this part of his claim has any reasonable prospect of success.

Conclusions – Detriment 2 - GLD

149. If the claimant maintains his Detriment 2 complaint against GLD, he will need to set out his basis for concluding that GLD was involved in the attack on his computer. I will then consider separately whether Detriment 2 should be struck out against GLD.

…

Next steps

167. I have made a separate case management order indicating what should happen next. The claimant is required to provide further information about Detriment 2, following which I will make a further decision in respect of that part of the claim…

16. I use the handle, "the October CMO" to mean the case management order referred to in the reserved judgment. It was sent by e-mail to the parties at the same time as the judgment itself.

17. Relevantly, the October CMO provided:

"

4. Within **14 days** of the date when this order is sent to the parties, the claimant must deliver the following information in writing to the respondent and the tribunal:

> 4.1 When, to the best of the claimant's knowledge, another person attacked his computer and destroyed data;
>
> 4.2 What files he alleges were tampered with;
>
> 4.3 If any file other than his "evidence file" was tampered with, what data that file contained;
>
> 4.4 If the claimant's case is that a single file relating to these proceedings has disappeared, the name of the file, and where it was stored on his computer.
>
> 4.5 The evidential basis that this was an "attack" as opposed to a computer malfunction;
>
> 4.6 What basis the claimant has for alleging that the attack was perpetrated by HMRC; and
>
> 4.7 What basis the claimant has for alleging that the attack was perpetrated by GLD.
>
> 5. The parties may make further representations in writing on the following questions:
>
> 5.1 Whether or not Detriment 2 should be struck out on the ground that it has no reasonable prospect of success…
>
> 6. Any such representations must be delivered to the tribunal and the other party within **28 days** of the date on which this order is sent to the parties.

18. The claimant did not provide the required information by the 14-day deadline specified in paragraph 4 of the October CMO.

19. HMRC and GLD separately e-mailed the tribunal to confirm that they had no further representations to make. The claimant did not make any representations within the deadline given in paragraph 6 of the October CMO.

20. On 28 November 2022, the claimant e-mailed the tribunal in these terms:

> "sorry but that is the time of cancer diagnosis. there remains dialogue ongoing re bundles of evidence. there really is too much to cope with.one strand at a time lets await response on the request for disclosure of the hearing bundle and what evidence is and is not in the bundle."

21. I interpreted that e-mail as a request for an extension of time. The claimant appeared to want to wait for "disclosure of the hearing bundle" in the combined cases before he complied with the October CMO. I caused a further letter to be e-mailed to the parties on 6 December 2022. The letter included the following:

> "The tribunal is concerned about the claimant's diagnosis. It will make adjustments to its procedures to try and avoid any disadvantage that the claimant's diagnosis may cause. The claimant should inform the tribunal of what steps he needs the tribunal to take and the tribunal will do its best to accommodate them.

> In the meantime, the claimant's request for an extension of time is refused. The information that the claimant is required to provide about Detriment 2 is straightforward. He ought to know this information already without having to look for it in the final hearing bundle. HMRC and GLD will not know what documents to put in the final hearing bundle until it is clear what allegations are to be determined at that hearing. A decision has to be taken on whether Detriment 2 to go forward to the final hearing or not. Only then can the bundle be finalised."

22. The claimant was given a further 7 days in which to provide the information required in the October CMO. That 7-day period expired on 13 December 2022.

23. On 11 December 2022 the claimant sent an e-mail to the tribunal. I reproduce it in full. See the earlier reserved judgment (paragraph 71) for my explanation of why I think it is relevant to refer to the claimant's manner of expression.

> "FAO REJ Franey,
>
> The Tribunal spent a long time fucking about dealing with matters piecemeal before eventually determining that all strands should be dealt with together in order to be dealt with in a fair and reasonable and properly considered manner that took in the whole context. It is difficult dealing with one strand never mind multiple stands at the same time.
>
> I am yet to see any confirmation that the evidence required has been admitted to the bundle and there is absolutely no trust and confidence given the current "missaprehension" that my submitting a seperate bundle would enable that bundle to be admitted when we get to a final hearing.
>
> In the circumstance lets have the Tribunal respect its already made decision to only have one strand of action. That key action here is to resolve the "missaprehension" and determine that the Tribunal shall up hold the protections in industrial Relations Act as defined in the ACAS guidance and get the evidence directly pertaining to such into a bundle. Once we have achieved that then lets deal with the 2410506 then.
>
> The evidence of the illegality of MOIS or as in the example of assault given in the prior email the CCTV evidence of a Employer assaulting and Employee does remain entirely pertinent in determining if the disciplinatu process was compliant with the ACAS guide that says the Employer must determine the circumstances of any alleged miss conduct. Its exclusion remains unreasonable however there is as has been stated other clear evidence of the HMRC subversion of the disciplinary process. Lets focus on getting the fucking evidence sorted out and then deal with matters in 2410506.
>
> Just stop kicking the shit out of me now and start showing some respect and less contempt."

24. I considered the possibility that, in this e-mail, the claimant was asking the tribunal to make an adjustment because of his cancer diagnosis. I do not think he was.

The claimant did say that it was particularly difficult dealing with multiple strands at the same time. But he did not suggest that this difficulty was anything to do with his diagnosis.

25. Even if, in his e-mail, the claimant was asking for the tribunal to make an adjustment to avoid his health being a barrier to justice, it would not be reasonable for the tribunal to have to take the step that the claimant wants the tribunal to take. This is because:

    25.1. The claimant's e-mail did not engage at all with the points made in the tribunal's letter of 6 December 2022. The October CMO does not require him to do anything onerous; just to answer some simple questions. If he waits for the bundle in the combined cases before complying with the October CMO, this will have an adverse impact on preparation for the final hearing, in the way the tribunal's letter describes.

    25.2. Granting a further extension of time would not avoid the difficulty of which the claimant complains. It will just delay the moment where the claimant would have to deal with "multiple strands". Once the bundle in the combined cases is finalised, the parties will then need to act quickly to prepare their witness statements in the combined cases. That will require the claimant to do more active work on the case than he has to do at the moment. Right now, he is (rightly or wrongly) waiting for the respondent to disclose things to him.

Relevant law

Overriding objective

26. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing and dealing with cases in ways that are proportionate to the importance and complexity of the issues.

Striking out and deposit orders

27. Rule 37 provides, so far as is relevant:

> (1) At any stage of the proceedings…. on the application of a party, a Tribunal may strike out all or part of a claim … on any of the following grounds-
>
> (a) that it … has no reasonable prospect of success;
>
> …
>
> (2) A claim … may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> …

28. Whistleblowing complaints are highly fact-sensitive. There is a strong public interest in such claims proceeding to a final hearing so that the evidence can be properly examined. Striking out such a claim on the ground that it has no reasonable prospect of success is reserved for the clearest of cases. The claim must be truly hopeless, taking the alleged facts at their highest. Where there is a central core of disputed fact, it is highly unlikely that should strike it out. See

Eszias v. North Glamorgan NHS Trust [2007] EWCA Civ 330 as authority for these propositions.

29. Before striking out a claim, or ordering a deposit, the tribunal must first make reasonable efforts to understand the complaints and allegations. This includes carefully considering the claim form and supporting documentation that the claimant has provided: *Malik v. Birmingham City Council* UKEAT 0027/19 at para 50-51. "Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is": *Cox v. Adecco* UKEAT 0339/19.

Social context

30. The *Equal Treatment Bench Book* (ETBB) identifies difficulties commonly encountered by litigants in person. The introduction to Chapter 1 includes this passage:

> "Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party."

31. It is well known that a party with mental ill health, including anxiety, can be at a disadvantage when it comes to participating in tribunal hearings. The ETBB provides ideas for how hearings can be adjusted in order to lessen such disadvantages. At page 425, one of the suggested adjustments is:

> "In severe circumstances, allow…written submissions to be provided."

32. Other suggested adjustments for mental disabilities (page 121-122) include "holding additional case management preliminary hearings", "extending time-limits for taking action".

Conclusions

33. I am satisfied that the claimant has had a reasonable opportunity to make representations. The three documents mentioned in paragraph 12 above explain how I formed that view at the time of the original judgment. Since then, the claimant has been ordered to provide further information about Detriment 2 and has been given a further opportunity to make representations in writing. He has not requested a further hearing.

34. I do not think that it would be worthwhile to give the claimant a further opportunity to provide the information required in the October CMO. The overriding objective is best achieved by making a decision on prospects of success in Detriment 2 on the basis of the information so far available.

35. In my view, Detriment 2 has no reasonable prospect of success. This is because it is vanishingly unlikely that he will be able to prove that either HMRC or GLD did the detrimental act of which he complains. Hacking into the claimant's computer and deleting data would be a very risky thing for HMRC or GLD to do. It would be a serious criminal offence. Reliable evidence would be needed to prove that anyone at HMRC or GLD had taken that risk and committed that crime. There is no prospect that the claimant will be able to put forward reliable evidence of the kind

that is needed. The highest he appears to put his case is to say that he used to have a file of evidence on his computer which he had not opened for a long time, and that file has since disappeared. There are all sorts of ways in which data may go missing from a computer without anyone having deliberately attacked it. Even if it could be established that someone gained unauthorised access to his computer and deleted the evidence file, there is almost nothing to suggest that that person was anything to do with HMRC or GLD. The claimant relies on an alleged refusal by HMRC's then Chief Executive Officer to provide an assurance to Parliament in 2014 that whistleblowers would not be put under surveillance. Assuming that the claimant could prove that the CEO refused to give that assurance, it will not get the claimant anywhere near to proving Detriment 2. Refusing to give a blanket promise against surveillance of whistleblowers is not the same as advertising an intention to delete data from a whistleblower's computer in 8 years' time.

36. The claimant has been ordered to answer specific questions about Detriment 2. The obvious purpose of that order was to establish whether the claimant might have some basis for contending that HMRC or GLD hacked into his computer. I warned the claimant that, if he did not answer the questions, I might draw an inference against him when considering whether Detriment 2 had any reasonable prospect of success. The claimant has not complied with the order. The most likely explanation for his failure to comply is that he knows he has no answer to the questions, or that his answers would expose Detriment 2 as hopeless. It supports a conclusion that Detriment 2 has no reasonable prospect of success.

37. I therefore strike out Detriment 2.

38. Since Detriment 2 was the only surviving part of the claim, the whole of the claim is now struck out.

39. The claimant has presented a number of other claims against HMRC, including 2408488/2015, 2404018/2017 and 2400171/2019. Those claims have been ordered to go forward to a final hearing. This strike-out judgment does not affect the claimant's ability to pursue those claims. The final hearing remains listed to begin on 15 May 2023.

Employment Judge Horne
3 January 2023

SENT TO THE PARTIES ON
3 January 2023

FOR THE TRIBUNAL OFFICE