EMPLOYMENT TRIBUNALS

Claimant: **Mr C Tchapdeu**

Respondents: **Unipart Group Ltd**

Heard at: **Leicester** **On:** **Friday 6 April 2018**

Before: **Employment Judge R Clark (sitting alone)**

Representatives

Claimant: **Dr R Ibakakombo, Representative**
Respondents: **Mr A Johnston of counsel**

JUDGMENT

1. The Claimant's claims set out in the amended claim dated 24 October 2017 under the heading "Victimisation claim against Steve Willey" are **struck out**.

REASONS

1. Introduction

1.1. This is the respondent's application to strike out certain claims of victimisation brought against the respondent in form, but in practice being claims making allegations against the respondent's solicitor, Mr Steve Willey. They arise in the third amendment of his claim dated 24 October 2017. The respondent seeks strike out on the grounds that they are vexatious and/or have no reasonable prospect of success.

1.2. This claim is already of some age. It was presented in January 2017 and does not yet have a final hearing date listed. It has been through a number of preliminary hearings. Prior to this latest amendment, in all but one respect the claimant's claims were struck out on the ground that they were presented out of time. The exception was the claims relating to the claimant's application for flexible working and his associated grievances. They were made subject to a deposit order which has been paid.

1.3. I have received a short bundle of documents, a written submission from Dr Ibakakombo and oral submissions from both representative. The claimant also

produced a written statement. This is not a hearing at which it is appropriate to hear evidence or make findings of fact and he was not called. I did not consider the witnesses statement other than in respect of reference being made to certain paragraphs during submissions.

2. The claim

2.1. The claims I am required to consider is put in these terms.

Victimisation Claim against Steve Willey

Protected Acts:
1.Claimant's ongoing ET1 Claim
2.Contents of the Claimant's letter dated 29/08/2017
3.Contents of the Claimant's letter dated 6/09/2017
4.Contents of the Claimant's letter dated 4/10/2017

Detriment:

1.When 13/10/2017, Mr Willey wrote to inform the claimant that his grievance letters dated 4th & 5th October 2017, 29th August and 6th September 2017, and latest letters which are related to the issues or matters currently before the Leicester Employment Tribunal will not be responded to other than by means of Mr Willey's letter dated 13/10/2017.

2.When concluding that if claimant continues to write to Unipart on these matters his letters will not be responded to despite of knowing that the Respondent is under duty to acknowledge receipt of the claimant's letter or contract the claimant in the course of his continuing relationship with them while he is physically absent from the workplace.

3.For advising the Respondent not to acknowledge receipt of the claimant's letter or contact the claimant in the course of his continuing relationship with them while he is physically absent from the workplace.

4.Mr Willey's failure to provide the claimant with requested copy of Company Policy, General Section of Law and/or Law Authority supporting that when an employee, who is off work due to work related stress, has a Claim before the tribunal, his grievances, which are related to the issue before tribunal, cannot be addressed and resolved in order to assist of facilitate that employee to resume work.

5.Mr Willey's failure to provide the claimant with name of the managers including their positions, who have instructed him to conclude that the claimant's latest letters will not be responded to other than by means of Mr Willey's letter dated 13/10/2017, and that if the claimant continues to write to Unipart on those matters, his letters will not be responded to (In event the names of those managers will be provided, the claimant will amend his claim against those managers)

6.When on 18/08/2017, Mr Willey asked the claimant to provide full names of Monika and Leeban and that the Respondent is currently unable to identify the employees referred to by the claimant as "Monika" and "Leeban".

7.When on 25/09/2017, Mr Willey said that Jose Fragona was not the claimant's line manager particularly, only on 3/10/17, the claimant was told by Mr Fragona that he will not be claimant's line manager anymore.

8.When on 25/09/2017, Mr Willey said that the claimant was given flexible working hours but he declined.

9.Failure to produce documents (Tribunal Claim ET1 form, business's ET3 form and corresponding Tribunal Judgement or copy of settlement agreement) related to Davinder Singh's Claim.

2.2. Certain aspects of that pleading require further explanation. Firstly, there is no dispute that the claimant has done a protected act.

2.3. The correspondence referred to dated 13/10/2017 appears in the bundle at page 26. This is part of a series of correspondence in which the claimant has repeatedly sought to raise further internal grievances concerning the matters are before the employment tribunal in these proceedings. The letter is a letter from Mr Willey which informs the claimant of his client's position. It states that the respondent will not consider grievances raised by him in respect of the ongoing dispute over working hours or those matters which are currently before the Employment Tribunal but it does make clear that it will consider any fresh grievances on matters outside that limitation. It is a repetition of the position previously stated by the respondent directly to the claimant.

2.4. Reference in paragraphs 2, 3 and 4 to the claimant being physically absent from the workplace is because he is currently on an agreed career break, the employment relationship otherwise continuing.

2.5. In paragraph 6, reference to the request made by Mr Willey is a reference to an oral request made by him when appearing on behalf of the respondent at the preliminary hearing held at Leicester before EJ Blackwell on 18 August 2017. At that time, the respondent had been given only the first names of these two comparators. It was stating that it was unable to identify them and sought their full names. In the event, it has subsequently identified them and amended its response accordingly.

2.6. In paragraphs 7 and 8, reference to Mr Willey making statements on 25/09/2017 are, in fact, references to factual averments in the respondent's amended grounds of resistance of that date which appear at paragraphs 16 and 36 respectively.

2.7. It is also to be noted that this amendment does not add Mr Willey as an additional respondent. Any claim relating to his actions must be as an agent of the principal respondent.

3. Submissions

The Respondent's Application

3.1. In support of the respondent's application, Mr Johnston submitted that this is an inherently weak and speculative claim against a party's legal representative and is vexatious. It has serious consequences to the fair administration of justice as it would end his ability to continue to act for the respondent. He would be required to give contentious evidence and be professionally embarrassed. He has been retained in this complicated case for over a year. Of further concern, there is nothing to stop similar, vague allegations being levelled at any replacement solicitor who did not respond to the claimant in exactly the manner he insisted with the ultimate consequence that the respondent could never be represented. Mr Johnston accepts a solicitor is an agent of the principal respondent under s.109 Equality Act 2010 but these allegations are not what s.109 was designed to address. Even if the acts complained of are capable of amounting to detriments, there is presently no evidential basis that will prove facts that Mr Willey acted as he did because of the claimant's claim of racial discrimination and there is no evidence, nor could there be, of any instruction so to act as the communications between respondent and Solicitor are covered by litigation privilege. The claimant puts his case on the basis that the respondent must disclose the communications between lawyer and client. He is requiring the

respondent to waive privilege in his demand to know the instructions he received. The claim should be struck out on the ground that it is vexatious.

3.2. Alternatively, it is in any event without any reasonable prospect of success. The Claimant has the burden of proving facts from which the tribunal could conclude there has been victimisation. He simply cannot do that. There is nothing to suggest Mr Willey has done anything other than act on his instructions and there is nothing in his conduct from which a tribunal could properly conclude that he was himself acting in a discriminatory manner. When one looks at the alleged conduct of Mr Willey, they are not properly detriments. At their highest, paragraphs 1-3 of the amended claim set out a principled and reasoned stance of proportionality. He has not suffered any disadvantage as the subject matter of those grievances is the substance of the claim before the ET and the claimant's substantive concerns will be considered in that forum. Allegations at paragraphs 4 and 5 deal with the refusal to disclose privilege communications. Paragraph 6 was no more than a request to identify the pleaded comparators. Paragraphs 7 & 8 are merely factual averments in the current pleadings to be tested within the proceedings. Such a fundamental state of affairs is present in just about every disputed case in all jurisdictions and there would have to be something very particular about it to permit it to become a basis of a further allegation of a statutory tort. Further, it was submitted that were a party inclined to embark on victimisation in the course of litigation, the factual examples at paragraphs 7 and 8 were inherently unlikely examples of how that intention might be executed. Paragraph 9 is a request for irrelevant disclosure which can and should be managed within the Tribunal's case management powers.

The Claimant's Response

3.3. For the Claimant, Dr Ibakakombo submits the claimants case is simple. The respondent's solicitor is acting on behalf of the respondent and either or both is discriminating against the claimant through his conduct. The claimant is still employed by the respondent and has a right to submit grievances at any time. Mr Willey has refused to provide the name of the manager who instructed him. If he did, the claimant would pursue that person instead. It is submitted that Mr Willey does not have a right to give his own evidence and that it is clear he was motivated to discriminate. Legal privilege does not mean a solicitor can discriminate.

3.4. In respect of the names of the comparators, Dr Ibakakombo submits that it is odd that the respondent has previously claimed to have fully investigated the grievance which included the two comparators, yet it now does not know who they are. He submits the reason for this conduct is because the claimant is now being victimised.

3.5. Dr Ibakakombo submits that Mr Willey is trying to cover up discrimination and that the claim does not stop the respondent being represented in the future. Dr Ibakakombo relied on an example at para 5.5 of the claimant's witness statement where there is a dispute about whether or not a letter was sent to the claimant dated 5 September 2017.

3.6. The claimant's case is that this hearing should not consider whether the detriments amount to detriments, there is a dispute of fact and that should be considered at a final hearing. Dr Ibakakombo relies on the well-known case of *Anyanwu v South bank Student Union and Others [2001] IRLR 305* together with

a number of authorities on the same broad point.

3.7. Dr Ibakakombo puts the allegation bluntly. He says that Mr Willey consciously knew what he was doing when he acted as he did, he knew by doing that he would hurt the claimant and he did this because the claimant was black. (I record here that that is how the submission was put even though the claim is one of victimisation and not direct discrimination). The claimant also conceded he does not know exactly what happened, but whatever happened was due either to Mr Willey's legal advice or a manager's instruction.

The Respondent's Reply

3.8. Mr Johnston accepts the authority that binds the tribunal on strike out of claims generally and, particularly, in fact sensitive cases such as those alleging unlawful discrimination. He submits that the case law does not create an absolute bar to strike out and that this is both an obvious and exceptional case. It is exceptional in that it is unheard of, at least in his personal experience of over 20 years employment practice at the bar, for a claim such as this to be brought against a regulated and qualified legal representative within the proceedings. He stresses that Mr Willey is not simply a representative, but an officer of the court and bound by professional obligations which in certain situations could transcend his instructions, an instruction to discriminate being one. It is obvious because it is such a weak claim in which the claimant's burden of proof faces an insurmountable and fundamental obstacle. It is fundamentally inappropriate in this case to seek to go behind legal privilege to litigate against the solicitor acting which strikes at the heart of the justice process.

3.9. As to the further authorities relied on, they do no more than restate the propositions of *Anyanwu*. He submits there is a significant difference between striking out a claimant's claim in its entirety and, as here, striking out a very small part of a much wider claim which will otherwise proceed.

4. Relevant Law

4.1. This is an application for strike out only. Rule 37 provides, so far as is material:-

> ***37 (1) 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 response on any of the following grounds -***
>
> ***(a)that it is scandalous or vexatious or has no reasonable prospect of success;***

4.2. Whenever the tribunal exercises any power given to it under the rules, it must do so in a way which seeks to give effect the overriding objective. Rule 2 provides:-

> ***2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—***
>
> ***(a)ensuring that the parties are on an equal footing;***
>
> ***(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;***
>
> ***(c)avoiding unnecessary formality and seeking flexibility in the proceedings;***
>
> ***(d)avoiding delay, so far as compatible with proper consideration of the issues; and***

(e)saving expense.

4.3. The classic statements on the tribunal's power to strike out fact sensitive cases on the ground they have no reasonable prospect of success comes from Lord Bingham of Cornhill in *Anyanwu, at paragraph 24*:-

> ***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 plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society.***

And Maurice Kay LJ in *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*, 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.***

4.4. This high threshold sits alongside the fact that strike out is, in any case in which it is contemplated, a draconian measure and will often be considered alongside the question whether the ability to conduct a fair trial is compromised which, it goes without saying, is central to the process of justice.

4.5. A detriment is something which a reasonable worker would take the view in all the circumstances puts him at a disadvantage. (*Ministry of Defence v Jeremiah [1980] ICR 13)*. The reference to the reasonable worker renders it an objective test and not one wholly in the gift of the particular claimant, although his perspective will form part of "all the circumstances".

4.6. To succeed in a claim of victimisation under *s.27 Equality Act 2010*, the burden rests with the claimant to prove the protected act and a detriment. The key to success is the causal link between the two expressed in terms of "because of", not "but for". It is a "reason why" question as is the case with other forms of discrimination. He must prove that the reason was the protected act or, at least, facts from which the tribunal could decide the reason was him making the protected act, in which case the burden would shift to the respondent (*s.136 Equality Act 2010*). If he cannot prove that, his claims cannot succeed. It is not enough for him to show a difference in treatment and difference in characteristic (or in the case of a victimisation claim, the protected act). Something more is required.

4.7. Strike out on grounds that the claim is vexatious engages other considerations. A vexatious claim is, broadly, one that is an abuse of process. In *Attorney General v Barker 2000 1 FLR 759 QBD* Bingham LCJ described the hallmarks of a vexatious claim as having:-

> ***Little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process***

4.8. The claimant's allegations require disclosure, or strictly inspection, of the

instructions and advice between respondent and its solicitor. Where the dominant purpose of correspondence between client and legal adviser is the conduct of litigation, legal professional privilege, in the sub category of litigation privilege, operates to prevent inspection of any documents that may exist. Important public policy underpins the ability of clients and lawyers to freely share instructions and advice. I fully accept also that solicitors are also under a regulated professional duty to the court which not only governs their conduct before a court or tribunal, but in certain situations could transcend their duty to their client and its instructions.

4.9. The privilege is all but absolute unless waived, but a court can go behind privilege where fraud or dishonesty is alleged. The balance to be struck between those policy aims was described by Goff LJ in *Gamlen Chemical Company (UK) Limited v Rochem Limited [1983] RPC1 (CA)* in terms that the court:-

> ***"..must bear in mind that legal professional privilege is a very necessary thing and is not lightly to be overthrown, but on the other hand, the interests of victims of fraud must not be overlooked. Each case depends on its own facts."***

5. Discussion

5.1. I deal first with the prospects of success. I reject Dr Ibakakombo's submission that it is not for this hearing to consider whether the allegations amount to detriments. If an essential element of a claim is not capable of being satisfied, that is exactly what this type of preliminary hearing is designed for. That is not the same as thing as making findings of facts to resolve disputes which is rightly the role of a tribunal at a final hearing.

5.2. The alleged detriments said to arise because of doing the protected act are odd examples of detriments if, indeed they are capable of amounting to detriments. They sit against other conduct by the same alleged wrongdoer, Mr Willey, which is favourable to the claimant in the conduct of the case to date, in particular the relaxed view taken to his various amendment applications. Equally, there are other acts of his, such as the previous application for strike out or deposit orders, which are not pleaded as examples of detriment. None of the alleged detriments stand out as being unusual or unexpected in the context of contested litigation. All have an explanation which is potentially reasonable and understandable. Furthermore, insofar as they are allegations of matters taking place in the course of litigation before live tribunal proceedings, they are subject to supervision through the various case management powers of the tribunal. Whilst none of that means the reason why could not be because of a protected act, there is nothing inherently discriminatory about the conduct and evidence of the reason being the protected act will have to be found elsewhere. However, before turning to the reason why issue, I have come to the conclusion that in all but one respect, the allegations cannot *reasonably* be regarded as detriments. The one exception is the respondent's position in not corresponding with the claimant in respect of grievances which are already before the tribunal, as manifests in various forms in paragraphs 1 – 5 of the amended claim. It seems to me that refusing to reply to the claimant (and its associated manifestations pleaded) must be a detriment and I must not conflate what appears to be the obvious answer to the reason why that happened, with whether the act complained of is capable of amounting to a detriment. Seeking further particulars, pleading facts and disclosure matters in the circumstances of this case fall outside the reasonable meaning of detriment.

5.3. I then turn to the reason why issue in respect of all allegations, including, in case I am wrong, those I concluded were not detriments. There is nothing prima facie discriminatory about the conduct from which the reason why question is answered. The claimant himself recognises the evidence to prove his belief will exist only in the flow of correspondence between respondent and solicitor during the process of giving and receiving instructions and legal advice. (For present purposes, I interpret that "belief" to be him doing the protected act, albeit his submissions instead attributed the reason why to aspects of his protected characteristic). He accepts that he does not know what lies behind the alleged detriments, only that he believes it was discriminatory. He seeks disclosure and inspection accordingly in order to prove a case which seems wholly speculative.

5.4. The obstacle in the way of that disclosure is respondent's entitlement to claim privilege in those documents which renders the very documents he seeks prima facie inadmissible.

5.5. The law does not place an absolute bar on privilege and privilege may be lost where it discloses a fraud on the other party. This case does not suggest fraud or dishonesty and to that extent, unless the respondent was to waive privilege, which they do not, the documents that the claimant seeks to rely on to prove discrimination will not be before the claimant or the tribunal. As that is where he says the evidence will be found, he will not be able to prove the reason why without an order for disclosure. Any such order would not happen without a preliminary stage of disclosure to a Judge, and not the claimant, for the purpose of reviewing the documentation in question in order to rule on the question whether any privilege existed and was to be overridden by order or not.

5.6. In reaching that conclusion, I have considered whether there could be any extension of the exceptions to privilege which would entitle a tribunal to override privilege and order disclosure. In particular, whether the fraud exception could be extending to include statutory torts of discrimination. I am not aware of any authority to that effect and none was relied on, but I take the view that it would serve the same broad objective and is, at least, possible that such an exception exists at common law. However, even if that is the case, the nature of the balance to be struck between the two competing public policies, as described by Goff LJ, would have to take into account all the circumstances of the case. For litigation to be conducted proportionately and efficiently, there would have to be something about the circumstances of the case which poked at the tribunal's concerns sufficiently to render it proportionate to embark on the necessary closed preliminary hearing at which the contested documents could be reviewed.

5.7. I turn, then, to consider the circumstances of this case and whether they disclose anything that might engage such concerns. Here, there is a weak case generally, already subject to a deposit. The ne claim is speculative. The victimisation allegation is borne out of a belief, but no other evidence. That claim depends on what the claimant believes might be found in the inspection of privileged documents. In itself that does not persuade me to go behind privilege and that conclusion only becomes fortified when I consider the nature of the detriments, if they are detriments at all, that they are minimal and peripheral and entirely consistent with the conflict created by ordinary litigation. The claim is peripheral to the substantive claim, perhaps obviously, but it is relevant that whatever my decision, the underlying claims will continue. A tribunal considering the alleged proscribed "reason why" will be faced with what appear to be

perfectly good, or at least non-discriminatory, reasons why the alleged acts happened. The allegation is levelled at an experienced representative governed by a professional code and regulatory regime and there is nothing about his conduct of the proceedings that raises any hint of concern. The subject of the grievances go to the substance of the matters before the employment tribunal such that seeking to litigate the respondent's declaration not to correspond on those matters during the claim does not materially add anything to the underlying claim. Conversely, not litigating take's nothing away from the existing claims. If a claimant succeeds, it is always open to him to identify aspects of the respondent's conduct in the litigation which may be relevant to aggravating injury to feelings, even if that conduct is not an act of discrimination in its own right.

5.8. In my judgment, none of the circumstances provide any basis for embarking on a closed disclosure hearing. In fact, they positively weigh against it. I am not at all satisfied there is anything before me to warrant an enquiry into the documents in question, even if there is such an exception in law to the doctrine of litigation privilege.

5.9. The respondent may therefore rely on its right to withhold inspection of documents subject to legal professional privilege. The claimant says he needs them to prove his case. Without them, he accepts he knows nothing about what lies behind Mr Willey's actions and will not be able to discharge his burden of proving discrimination. As he will not have any evidence of the reason, it follows there is no reasonable prospect of success. This case falls within the obvious or exceptional circumstances where an order for strike out is just and proportionate.

5.10.Having reached the conclusions I have, it is not necessary for me to consider further whether the claim should also be struck out on the ground that it was vexatious. I have, however, come to the conclusion that it does fall within the definition of vexatious. A party can act vexatiously, which implies motive, or his acts can simply be vexatious, whether they are intended as such or not. I don't need to find motive. It is sufficient in my judgment that the effect of this particular claim is vexatious. The allegations are very much peripheral to the underlying claim, they require a court or tribunal to go behind legal privilege where there is no apparent reason to do so and the basis for seeking it is speculative. Were they to proceed they could have a negative effect on the efficient and proportionate conduct of the litigation as Mr Willey is likely to be compromised in his continued ability to represent his client. They attach to the ordinary process of litigation and seek to turn the normal adversarial process (even in this more informal jurisdiction) into substantive allegations. Whilst I do not say that acts of discrimination could never be made out in the process of litigation, there is nothing that raises even a prima facie concern. The fact that the claimant's remedy on the underlying claim, at least insofar as injury to feelings, can be aggravated by the conduct of the litigation as well as the original statutory tort itself, means the negative effect on the respondent is grossly disproportionate to any likely benefit to the claimant. I would strike out on this ground had I not already reached the conclusion I have above.

6. **Case Management**

6.1. Whatever decision I was to reach on the application, further case management orders remained necessary in any event to progress the claims through to a final hearing. They are set out in a separate order.

Employment Judge Clark
Date 15 May 2018

JUDGMENT SENT TO THE PARTIES ON

29 May 2018

FOR THE TRIBUNAL OFFICE