JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Headley**

Respondent: **London Fire and Emergency Planning Authority**

Heard at: **East London Hearing Centre**

On: **27 March 2018**

Before: **Employment Judge Moor (sitting alone)**

Representation

Claimant: Mr M Shepherd, Counsel

Respondent: Miss L Suding, Counsel

JUDGMENT

The judgment of the Employment Tribunal is that the Respondent's application to strike out the claim and/or any parts of it is dismissed.

REASONS

1. The Claimant remains employed by the Respondent as a Fire Officer/Crew Manager. This claim arises out of a formal grievance he made in respect of an incident at work between himself and Station Manager Cook ("SM Cook") on 13 April 2017. Put simply, the Claimant argues that the way in which his grievance about this incident and its appeal were handled was direct race discrimination and/or victimisation contrary to the Equality Act 2010.

2. This afternoon, I clarified the issues in the case with the parties. The claim is adequately and clearly pleaded and both Respondent and Claimant have provided a draft list of issues. From these matters, and the oral submissions made by Mr Shepherd today, the issues appear to be as follows:

Issues

Section 13: Direct discrimination because of race

3. Did the Respondents subject the Claimant to the following alleged detriment:

3.1. Not upholding the Claimant's grievance.

3.2. Not upholding the Claimant's grievance appeal.

3.3. Failing to carry out a reasonable investigation into the Claimant's grievance and/or appeal by:

3.3.1. failing to inform witnesses that the investigation was confidential;

3.3.2. failing to inform witnesses of the importance of telling the truth;

3.3.3. failing to reassure witnesses that they would not be victimised as a result of giving evidence as a part of the grievance investigation.

3.4. Group Manager Powell ("GM Powell"), the manager who investigated the grievance, accepted SM Cook's version of events at face value.

3.5. Failing to disclose witness statements obtained as part of the grievance investigation to the Claimant, contrary to the Respondent's grievance procedure.

3.6. Failing to offer the Claimant the opportunity to consider mediation, contrary to the Respondent's grievance procedure.

3.7. GM Powell, in the grievance outcome letter, accusing the Claimant of acting in bad faith when he submitted his grievance and failing to provide any evidence to support this assertion.

3.8. Failing to provide the witness statements obtained during the grievance investigation to the Claimant in response to his Subject Access Request.

4. Did the Respondent treat the Claimant as alleged, less favourably than it treated or would have treated other comparators in not materially different circumstances? The Claimant relies on hypothetical comparators and SM Cook as a comparator in that his complaint about the incident of 13 April was more thoroughly investigated by virtue of the Respondent interviewing more witnesses.

5. If so, are there facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of race? The Claimant identifies his race as being black Caribbean. The Claimant will argue that the following allegations show that, in his case, there was something more than detrimental and different treatment, which could enable the Tribunal to infer the reason for the alleged detriments was race.

5.1. The difference in race between himself and SM Cook and the different number of witnesses who were interviewed in respect of their complaints about the same incident: the Respondent interviewed 21 witnesses for SM Cook's complaint whereas it interviewed 9 or 10 witnesses for the Claimant's.

5.2. The Respondent's failure to interview Mr Coleman who the Claimant had identified as being a relevant witness.

5.3. The Respondent's failure to answer all of the questions included in a discrimination questionnaire sent to it.

5.4. The Respondent's failures to follow its own procedures.

5.5. The acceptance of SM Cook's account albeit that he had been described by a senior officer in the Respondent as "acting like a Nazi".

5.6. The allegation of bad faith.

I have included above these 'something more' matters referred to in Mr Shepherd's oral submissions today. It is important to identify the alleged facts that the Claimant will rely on to invite the Tribunal to infer that the detriments and different treatment he experienced were on grounds of race. These are not set out in his written claim but are relevant to my consideration of the Respondent's application to strike out the claim and I therefore set them out here for completeness.

6. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment? The Respondent will say it had reasonable grounds for preferring SM Cook's account that were nothing whatsoever to do with race.

Section 27: Victimisation

7. Did the Claimant do a protected act and/or did the Respondent believe that the Claimant had done or might do a protected act? The Claimant relies upon his making of a formal grievance on 24 April 2017 concerning SM Cook's conduct, which he contended was because of race. (Currently, the Respondent does not admit this to be a protected act.)

8. Did the Respondent subject the Claimant to the detriments set out above?

9. If so, was this because the Claimant did a protected act and/or because the Respondent believed the Claimant had done or might do a protected act?

Time limits/Jurisdiction

10. Have any of the claims been presented outside the statutory time limits set out in Section 123 of the Equality Act 2010? Dealing with this issue may involve consideration of the following subsidiary issues:-

10.1. Whether there was an act and/or conduct extending over a period and/or a series of serious acts or failures; and

10.2. Whether time should be extended on a just and equitable basis.

Remedy

11. If the Claimant succeeds in whole or part, the Tribunal will be concerned with issues of remedy and in particular if the Claimant is to be awarded compensation.

Other Procedural Matters

12. The Claimant indicated he is likely to present a further claim in respect of further alleged detriments concerning the same issue and it was therefore agreed by both parties that it was appropriate to vacate the date listed for the full hearing of this claim.

13. I also indicated the Tribunal will stay the Case Management Orders in respect of this claim, until 27 April 2018 when the file will be brought forward for the listing of a further Preliminary Hearing and consideration given, at that stage, if a second claim has been presented, for the two claims to be heard together.

14. Due to an administrative error the typed copy of her decision was not forwarded to the Employment Judge for her approval promptly and the Tribunal apologises to the parties, therefore, for the time it has taken for them to receive this written judgement and Case Management Orders. Fortunately, because of the stay on proceedings, this has not unduly delayed the progression of the claim.

Respondent's Application to Strike Out

15. The Respondent has made an application for an order to strike out the Claimant's claim in its entirety.

16. I heard helpful submissions from both counsel and was referred to some of the contemporaneous documents. I will refer to the Respondent's bundle as R and the Claimant's bundles as C.

Respondent's Submissions

17. Miss Suding argued that the claims for direct race discrimination and victimisation lay merely at the level of assertion. She contended that the Claimant had not identified any link to race nor to the alleged protected act.

18. She submitted he had to show something more than unreasonable or unfair conduct by the Respondent in order to establish any reasonable prospect of success in his discrimination claims and that he had not done so.

19. She suggested that what had really happened here was that the Claimant had conflated his complaint of race discrimination about SM Cook with the way in which the Respondent had dealt with those complaints in his grievance and its appeal.

20. In relation to the particular detriments alleged, she made the following forensic points in order to argue in relation to each claim and overall that it had no reasonable prospect of success, namely that:

20.1. in his appeal against the grievance, the Claimant did not complain that the grievance outcome itself was an aspect of race discrimination or victimisation;

20.2. his initial grievance did not contain sufficient conduct to amount to an allegation of bullying because of race, because the Claimant referred to his allegation coming from his 'gut feeling' and, on his own account, SM Cook had shouted at him to remove his FBU badge which was not related to his race. Nor was there any allegation that SM Cook's language was race specific;

20.3. of the 10 witnesses interviewed nobody supported the Claimant's assertion of events and it was therefore unsurprising that his grievance was not upheld;

20.4. during the appeal, the Claimant had agreed to withdraw his complaint that he had not been provided with copies of witness statements;

20.5. she disputed the allegation that no 'weighting' was provided by the decision maker by reference to the outcome letter as stating it was given on the 'balance of probabilities';

20.6. she contended that GM Powell's question as to the motivation for the grievance was explained by the fact that it was chronologically and factually correct because the Claimant had only made his complaint after hearing that SM Cook had also made a complaint;

20.7. she contended that there was an extensive investigation involving 10 witnesses, four of whom were put forward by the Claimant, and at meeting with the Claimant at which he was accompanied;

20.8. she referred me to interview notes of witnesses in which the preface stated that interviewees had been informed of their obligation to tell the truth, reassured they would not be victimised and reminded that the interview was confidential. She argued therefore that the facts of this alleged detriment were wholly inconsistent with contemporary documents;

20.9. she contended that the grievance procedure did not provide for the disclosure of witness statements or an offer of mediation services;

20.10. she argued that the witness statements were exempt from disclosure under the Subject Access Request under the relevant legislation until the disciplinary investigation into the Claimant's conduct had been concluded. And, even if that were wrong legally, that was the Respondent's reason for taking such action and therefore was not connected to race or the protected act;

20.11. Miss Suding contended that therefore the Claimant's case was inconsistent with contemporaneous documents in particular, the interview notes, the grounds of appeal, the grievance procedure and the outcome letter.

21. She invited the Tribunal therefore to strike out the claim and/or order the Claimant to pay a deposit of £1000.

22. Miss Suding did not pursue in oral submissions the arguments set out in the written application that the claim was scandalous or vexatious. It should be noted that the Respondent has alleged that the claim is to 'vilify' the Respondent and its employees and subject the Respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant.

Claimant's Submissions

23. Mr Shepherd made oral submissions by reference to a detailed note to which I refer.

Law

24. Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 provides that a Tribunal can strike out all or part of a claim on the grounds that it has "*no reasonable prospect of success*". This threshold is a high one.

25. If the facts alleged by the Claimant disclosure no arguable case in law, then it would be appropriate to strike out his case on that ground. Where that is not the case and in a discrimination claim where facts or the interpretation of them are in dispute, the guidance of the higher courts is that it would only be in an exceptional case that strike out is appropriate, see eg Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ. 330.

26. In discrimination cases particular concerns arise in attempting to consider the merits of a case prior to a hearing at which the evidence can be tested. The process is fact sensitive and often subtle. The correct approach is set out by Wilkie J in Sharma v New College Nottingham UK EAT/0287/11 (paragraphs 18-20).

> *It is well established that it is important to bear in mind, in deciding whether a Claimant has proved facts from which the Tribunal could conclude, in the*

> *absence of an adequate explanation, that the Respondent has committed an act of unlawful discrimination against the Claimant, that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be intentional, but maybe based on an assumption. In deciding whether the Claimant has proved such facts, the Tribunal will usually consider what inferences it is proper to draw from the primary facts found by it. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.*
>
> *This approach to the first stage in the process of determining whether or not there is a sufficient case to pass the burden of proof to the Respondent is well established it is contained in the annexe to the Court of Appeal decision in Igen v Wong [2005] EWCA Civ. 142.*

27. Discrimination cases and strike out were considered by the House of Lords in the case of Anyanwu v South Bank Students Union & Others [2001] UKHL14 [2001] ICR 391 in which Lord Hope said, at paragraph 37:

> *I would have been reluctant to strike out these claims on the view that discrimination issues of the kinds which have been raised in this case should as a general rule be decided only after hearing the evidence. Questions of law that are to be determined are often fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The Tribunal can then base its decisions on its findings of fact, rather than on assumptions, as to what the Claimant may be able to establish if given an opportunity to lead evidence.*

28. Furthermore, Lord Steyn made the now well-known remark that in pluralistic society it is important to decide discrimination cases after a full examination of the facts.

> *In this field, perhaps more than any other, the bias in favour of the claim being examined or the merits or demerits of its particular facts is a matter of high public importance.*

29. Nevertheless, it is open to the Tribunal to strike out a discrimination claim if, on the facts alleged by the Claimant, it discloses no claim in law or it is a plain and obvious case where there is no reasonable prospect of success. This is because it is not in accordance with public policy for Tribunal time to be taken up by hearing cases on the evidence that are bound to fail. Where a claim is '*conclusively disproved by*' or is '*totally and inexplicably inconsistent*' with undisputed contemporaneous documents, then that might provide grounds for arguing that it has no reasonable prospect of success. Miss Suding, being well aware of this guidance to the Tribunal, sensibly confined her submissions to considering the Claimant's claim at its highest and also confined her submissions on strike out to the question whether it had **no** reasonable prospect of success.

30. Mr Shepherd relied on Sharma (above), to contend that it is not be possible to strike out a discrimination allegation even where contemporary documents were inconsistent with it. I do not consider Sharma goes that far or establishes such a

principle. In Sharma the Tribunal had made a deposit order because contemporary minutes of a meeting did not appear to support the Claimant's case that he had been bullied. The EAT held, given the discrimination test and the appellate guidance and the extent of the disputed facts in the case, that it was insufficient of the Tribunal to decide that merely because the minutes did not support the Claimant's case, it had little prospect of success. This case does not mean that in an appropriate case where contemporary documentation does not support a particular issue, that the Tribunal cannot take the view that the issue has no or little reasonable prospect of success. Each case will very much turn on its own facts. Thus, for example, in Ahir v British Airways plc UKEAT/0014/16/RN HHJ Eady QC upheld a Tribunal's decision to strike out claims as having no reasonable prospect of success. The reason for dismissal was disputed. The Claimant had lied on his application form but maintained the employer already knew this and had fabricated an anonymous letter allegedly disclosing this fact shortly after he had lost another discrimination claim in the Tribunal. The EAT held that the Tribunal was entitled to decide that the Claimant was putting forward an essentially implausible case, founded upon a baseless assertion that it was entitled to reject outright. It was undisputed that the anonymous letter had been considered by six separate managers, each of whom separately took the view that it warranted disciplinary action.

31. In Ahir the EAT cautioned that, where claims appear weak on their face, there can be a temptation to take a short cut and determine the case summarily. When the claim represents a genuine grievance on the part of the complainant such a step is unlikely to provide a real short cut as the number of appeals against strike out decisions makes clear. The Tribunal should bear in mind that testing evidence at a hearing can often confound expectations and prove false earlier assumptions about the merits of the case.

Application of Law to Issues

32. I am not persuaded that this claim has no reasonable prospect of success. Miss Suding came close at points in her submissions, to requiring each allegation to raise an express link on the evidence with race in order to disclose an arguable case. That would be virtually impossible in many race discrimination claims and seems to me to disclose a misunderstanding of the approach required to be taken in discrimination claims as summarised by Wilkie J above. Such claims often depend upon the Tribunal drawing inferences from facts that might appear at first to be relatively minor.

33. In this case, the Claimant has identified a series of alleged detriments in the way his grievance and associated appeal were handled and decided. He argues that individually and overall these detriments amount to unfavourable and different treatment from a hypothetical comparator i.e. an employee who was not black Caribbean. In essence his claim is: 'Had I been white or not black Caribbean my grievance and appeal would not have been determined in the same detrimental way' or 'Had I not raised a race discrimination complaint then ditto'.

34. First, it seems to me that it cannot be said there is no arguable case that each of the alleged detriments may amount to one if established on the facts. To find a detriment the Tribunal '*must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been*

disadvantaged in the circumstances in which he had thereafter to work', Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL (para 34).

34.1. Plainly, the failure to uphold the grievance and appeal might fall into this category: the Claimant had a complaint about his manager. He could reasonably take the view that the failure to uphold this complaint was likely to create problems for him at work in the future, That the Claimant did not pursue a race discrimination allegation during his appeal does not render the claim unarguable: there can be all sorts of strategic and personal reasons why a Claimant does not raise an allegation of discrimination at the first possible moment.

34.2. Likewise the procedural matters complained of are also arguably detriments: not having had the matter investigated adequately or taking other statements at face value; not providing the Claimant with witness statements; not providing an opportunity for mediation; and not reassuring witnesses. These are all matters that a reasonable employee might regard himself disadvantaged by. The fact that the complaint about witness statements was withdrawn at the appeal stage does not render it hopeless at the Tribunal: again, the Claimant may have had good strategic or personal reasons for not doing so.

35. Second, whether the Claimant was subject to the detriments can only be determined after hearing the disputed facts. The Respondent has not persuaded me that there are any undisputed facts or documents wholly inconsistent with the Claimant's case. In particular:

35.1. that SM Cook's version of events was taken at face value is an allegation that can only really be tested upon hearing the evidence of the decision maker. The assertion in the outcome letter that he decided the matter on 'balance of probabilities' is disputed.

35.2. The Respondent argues that the witness statements now provided are a complete answer to issues 3.3.1-3.3.3. But the Claimant questions the reliability of those statements. It is said by the Respondent that they were taken during the course of the investigation but he points out that they are neither dated nor signed, in contrast to his own. He also points to the fact that they have been denied him until he brought this claim. The reliability of those witness statements will therefore need to be assessed in evidence at a full hearing. It would be wrong of me to draw conclusions about the circumstances of their creation before that occurs.

35.3. As to non-disclosure of witness statements obtained during the grievance investigation. I have been shown paragraph 15 of the Respondent's grievance procedure (R49) which provides that: '*copies of meeting records should be given to the employee including any formal minutes which may have been taken. In certain circumstances for example, to protect a witness, some information may be withheld*.' It appears to me clear therefore that the Claimant has an arguable

case that he ought to have received copies of the interviews with witnesses who were investigated during the grievance procedure.

35.4. The Respondent argues that its procedure did not give an employee the opportunity of requesting mediation and this alleged detriment has therefore no basis in fact. Mr Shepherd took me to paragraph 1 of the grievance procedure at R47 in support of the allegation. It records '*employees should aim to resolve most grievances quickly and informally by discussing them with their line manager*… .' The reference to 'informally' might arguably be a reference to mediation. There is also paragraph 4 of the grievance procedure that records '*the employee will be given a full opportunity to explain their complaint and say how they think it should be settled*'. This may form the procedural basis of the Claimant's complaint. For these reasons, I do not consider that this complaint has no prospect of success as an alleged detriment.

36. Nor can it be said that the Claimant has no prospect of establishing that he was subject to a detriment by being accused of bad faith in submitting the grievance. There are arguments on both sides here.

36.1. In the outcome letter, GM Powell informed the Claimant: *I understand you only raised your complaints after you became aware that a management investigation had commenced as a result of your own behaviour. In view of this, and given your claims were not supported by any evidence, I am led to question your motivation in raising your complaint and it appears that your complaint may be designed to frustrate the management investigation*.

36.2. This is arguably an allegation of bad faith and may either be for the reason GM Powell set out (the coincidence in timing of the Claimant's grievance after SM Cook's complaint) or it might be because he had done a protected act or, depending upon the facts, it might not have been something SM Powell would have gone on to say had the Claimant been white. The matter will have to be determined after a full hearing.

37. The final alleged detriment, failing to provide witness statements in response to the Subject Access Request, is also reasonably arguable as a detriment especially given the requirement of the Respondent's own policy to provide meeting records as set out above. The parties dispute the legal correctness of the denial. Miss Suding's assertion that it was its view of the law (right or wrong) and not the Claimant's protected characteristic or protected act that caused the Respondent not to disclose is a matter that will have to be tested in the evidence.

38. Third, it seems to me the matters the Claimant has set out in order to persuade the Tribunal to draw an inference of race discrimination are sufficient to establish a claim. It cannot be said that the claim lies merely at the level of assertion. The 'somethings more' set out in the issues are not so inconsequential as to make the case unarguable. Taken together they could allow an inference of race discrimination. In

particular the following matters, if proved, might be said to be surprising and without explanation *could* lead to an inference that race or the alleged protected act were the reasons for the detriments in the absence of an adequate explanation for them:

38.1. the allegation that the Respondent failed to speak with a witness the Claimant had referred to, Mr Coleman;

38.2. that GM Powell did not ask appropriate probing questions in particular, whether the interaction between the Claimant and SM Cook was because of the Claimant's race;

38.3. that the Respondent allegedly interviewed 21 witnesses in respect of SM Cook's complaint about the same incident whereas they allegedly interviewed only 9 or 10 witnesses in respect of the Claimant's complaint about the *same* incident. The Claimant's allegation that there was a more thorough investigation in relation to SM Cook's complaint than his own has at least some factual basis. It could be open to a Tribunal to find this difference surprising and, given their difference in race (I was told that SM Cook is of mixed racial heritage), a Tribunal *could* decide that in the absence of any explanation that race was the reason.

39. Finally, it is plainly arguable that the Claimant made a protected act as set out in the issues. As I have found that it is arguable that there were detriments, then the reason for them can only be determined at a hearing: is it because of the protected act or because of the Respondent's explanation? For the reasons I set out above, there is nothing in the contemporaneous documents or undisputed facts which enables me to decide this question obviously in the Respondent's favour at this stage.

40. For all of these reasons, I am not persuaded that either the direct discrimination or victimisation claims have no reasonable prospects of success. I decline to strike them out.

41. I have made the case management orders set out in a separate document, by consent.

Employment Judge Moor

23 April 2018