



EMPLOYMENT TRIBUNALS

Claimant: Kamran Yusuf
Respondent: Derby City Council

Record of at Open Preliminary Hearing heard at the Employment Tribunal (Hybrid)

Heard at: Nottingham **On:** 15-16 November 2021
(Day 1 reading in)

Before: Employment Judge P Britton (sitting alone)

Representation

Claimant: Ms S Crawshay-Williams of Counsel

Respondent: Ms J Smeaton of Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

I reserved my decision make which I undertook on 17 and 18 November 2021. Before me the Claimant was represented Ms S Crawshay-Williams of Counsel and the Respondent by Ms J Smeaton of Counsel. In the live hearing the Claimant was present throughout and was assisted by two BSL signers approved by the Tribunal namely Judy Scholes and Victoria Carrabine.

JUDGMENT

1. The claim of Victimisation pursuant to section 27 of the Equality Act 2010 is dismissed, it having no reasonable prospect of success.
2. That part of the Constructive Unfair Dismissal claim for the period up to January 2019 is dismissed as having no reasonable prospect of success.
3. That part of the Constructive Unfair Dismissal claim in relation to events thereafter and up to the Claimant's resignation in October 2020 is permitted to proceed and no Deposit is ordered as it may have more than little reasonable prospect of success.

4. Directions for the way forward are hereinafter set out.

REASONS

Introduction

1. I heard a first Case Management Hearing in this matter 28 April 2021. It was a lengthy hearing, and my Case Management Summary runs to some 6 pages. As a consequence thereof I granted the Respondent's application that I should determine by way of an open Preliminary Hearing as to whether or not to strike out all or part of the two claims before me as having no reasonable prospect of success, or in the alternative in relation to both or either of them order that the Claimant pay a deposit them or part of them having only little reasonable prospect of success.

2. So that has been the agenda this hearing today which was originally listed to take place on 21 and 22 July 2021 but had to be postponed because of the absence of available BSL signers.

3. As per my orders I received some further and better particulars from the Claimant's Solicitors on 10 June 2021. The Respondent asked for additional clarification thereof and it received this on 16 June 2021. The Respondent then made its own detailed additional submissions on 6 July 2021 all of which I have read.

4. Also in accordance with my orders, before me has been the report of the investigation undertaken by the Respondent into the issues at the heart of the claims, and which runs to some 1100 pages. It was undertaken by Emily Freeman (EF), Investigating Officer and Head of Safeguarding with the Respondent. I have also had regard to the additional documentation at the rear of the three bundles which relates to issues thereafter including as to how the internal disciplinary hearing should continue to take place. Second therein is the decision made by Claire Davenport (CD), upholding the allegations against the Claimant and which she published in April 2021. This commences within the bundles before me at Bp1321.¹ CD is the Director of Leisure, Culture and Tourism within the Respondent. She concluded having found against the Claimant on the allegations that if he had still been employed by the Respondent, then he would have been dismissed. But of course, and for reasons I set out in the Case Management Summary, he had resigned on 7 October 2020.

Events; issues and first observations

5. In terms of the chronology of material events I shall now set it out. On 1 February 2017 the Claimant brought a claim to Tribunal (ET1 no 1). It in turn stemmed from a grievance that he had raised and his dissatisfaction with the outcome. As to the extent of that grievance I do not have it before me, but I can detect from the opening statement (Bp1070-1091) of the senior trade union official (Barbara McKenna) for the Claimant at the disciplinary hearing which started on 21 January 2020 but then had to be

¹ BP equals bundle page

adjourned out for “lack of availability of participants”, that this was a wide ranging grievance which included a claim of race discrimination, and which was settled on 26 October 2017. I have not been informed of the terms of that settlement and I do not have ET1 (no 1) before me.

6. Stopping there, the clear thrust of the ET1 in the case before me and in terms of the Grounds of Complaint pleaded therein, was that immediately after the settlement of ET1 no 1 the Respondent started to “solicit” complaints from service users against the Claimant. And that in so doing it victimised him as to which see paragraph 7 starting with the service user DA and “The Respondent approached the service user in order to solicit a complaint”. Then bringing in the further and better particulars, this was somewhat softened to albeit the initial complaint which was received may not have been solicited, it did not come direct from DA; and that what the Respondent then did in particular via the Team Manager, Lesley Kopek (LK) and a Senior Social Worker Practitioner, Sue Drummond (SD) was to unjustifiably escalate it by approaching him and his mother direct and which led through to wrongfully soliciting complaints from other service users.

7. Going back to the chronology, suffice to say that as I initially observed at the Case Management Hearing and which is now borne out by the documentation before me, it cannot be correct that events only started after the settlement of ET1 no 1. The initial complaint, it seems quite clearly made on behalf of DA, who is deaf, and via the HR Adviser at Denby Pottery where he worked, namely KA, was actually incepted via her raising her concerns with the Respondent on 26 October 2017 (see Bp493). It follows that in that respect the initial concerns were raised before the settlement which took place 3 days thereafter.

8. As a result of those concerns being raised by KA, LK immediately escalated matters up to her superiors and the decision to further investigate was directed by them; namely Vickie Minion (VM) who is Head of Services (Deaf Services) and Perveez Sadiq (PS) who is the Service Director of Adults and Health. On 3 November 2017 DA was interviewed by SD (see Bp257 onward). When DA was interviewed present was his mother, BA, KA, and at least one Supervisor from Denby Pottery plus a minute taker. That interview was extensive and goes through to Bp273. DA signed it as correct on the same day. BA was interviewed on 14 November 2017 by SD. She is not deaf. The interview commences at Bp265. The concerns that SD and LK had as to safeguarding issues emerging from those interviews meant that the matter was then referred back to VM who having consulted PS suspended the Claimant on full pay on 20 November 2017. He was so informed (Bp 147) in the presence of a BSL signer as he is profoundly deaf.

9. Because of the seriousness of the concerns as to the Claimant’s behaviour to DA, in accordance with its procedures, and in particular see the Safeguarding Procedures in the bundle commencing Bp803, the matter was therefore reported to Safeguarding which is something I am well aware of in terms of my extensive experience as a Judge. This was circa 1 November 2017 (Bp135). It was also reported to Social Work England (SWE) because the Respondent is obliged to do so the Claimant being a qualified Social Worker.

10. On 23 November 2017 Emily Freeman (EF) who is Head of Safeguarding Audits and Professional Standards was appointed to undertake the investigation. At that stage it is plain that she thought it could be done in about 6 weeks. But that timescale was thence expanded and because other concerns came to light from service users. They are all profoundly deaf.

11. From the bundle it can be seen that a service user (AM) had actually raised a complaint on 11 October 2017 (Bp339). So, before any settlement of ET1 no 1. Furthermore, a Welfare Reform Officer, Nicola Berry (NB), had raised concerns on 22 November 2017 (Bp373 and see interview at Bp315) relating to the treatment by the Claimant of another deaf service user DB. Then on 6 December 2017, when interviewed by LK, who is her line manager (Bp 293), SD who is a Social Worker exclusively working with the deaf for the Respondent with some 40 years of service in that respect and her being a BSL Signer, reiterated how she had first raised concerns viz the Claimant concerning service user NS in July 2017. Cross reference to DA and the concerns of NB and a pattern was emerging. Then on 3 January 2018 another service user RN had come into reception and also raised concerns when he was seen thereat by SD who again escalated the matter (see Bp379). And finally, in this respect, and this is only a summary not a full resume of all events, on the 3 January 2018 Mohammed Ahmed (MA), who is a Support Worker for the Deaf working in a freelance capacity for the Respondent, also raised concerns about the Claimant and inter alia now relating to another service user, RN, as to which see Bp338.

12. It thus follows that this would explain why the investigation expanded and thus the time frame. It also explains why the suspension was extended. As to the terms of that suspension I will deal with in due course. The Claimant was interviewed during this period by EF on 5 occasions between 19 February 2018 and 8 May 2018. At each interview he had with him a trade union representative and a BSL Signer was present.

13. The investigation then further extended because on 10 May 2018 another service user, AJ, made a complaint and thence a further complaint was received this time from service user MC on 17 May 2018 (Bp 298).

14. There is a theme to some of these complaints which relates to whether or not the Claimant was exploiting his position to get them to change their Access to Work (ACW) budget for expenditure on BSL Signers and Social Support Workers, the inference being that it might financially benefit the Claimant through his involvement in a BSL Signing business namely De Star Communications Limited.

15. Also it emerged by way of another worker in the Deaf Team in which the Claimant worked that he had been working for an agency namely One to One Support Services and had not informed the Respondent, which he is obliged to do under its policies and procedures as is clear from the bundle. Also as is clear from the policies if the Claimant had an involvement in De Star or was soliciting on its behalf in terms of it therefore benefitting, then he would be obliged to disclose the same. That there was some involvement even if it wasn't his business but that of his brother Irfan, is clear from the statements that the Respondent obtained from MA, to whom I have now already referred; the Claimant's own interpreter/ support worker Mr Davey (KD) as to which see the interview commencing at Bp305 and in particular Bp307; and also another BSL

Communication Support/Interpreter who was in place to assist DA at the material time, namely HN, as to which see Bp269. And finally, on this topic and before I move onwards, when the Claimant was suspended he had referred to his brother's involvement with De Star and that the brother had for a while gone travelling abroad but was now back and needed to get more hours for the purposes of his business activities as a BSL provider. It is right to say that although that interview was in the presence of his trade union official and the BSL interpreter, subsequently the Claimant was to deny that the interpretation was accurate.

16. I also observe that at the first date of the disciplinary hearing to which I referred the Claimant said that MA was going to retract his statement as having been obtained by duress. The subsequent statement does not seem to be before me in the bundle. Suffice to say that I note that MA not only signed the interview he had with the Respondent as being correct, but he had made corrections to it as to which see Bp335, and which did not materially alter the evidence which he had given therein.

17. In any event it inevitably meant that the investigation took longer than expected. EF updated the Claimant following a follow up meeting on 8 August 2018 at which she explained there were now further lines of enquiry. Then on 26 October 2018 she informed him that it was taking longer than expected.

18. Stopping there and looking to the chronology as in the investigation report as to which see Bp18-29, and it can be seen the extent of the investigation which included tracking back into emails and other documentation. However, it is to then be noted, and here I am with the Claimant's Counsel's concerns,² that although suspension renewal review letters continued to emanate out from the VM and it is important to stress not EF, that the report was not produced until 9 October 2019. The explanation in that respect of the Respondent is that EF was tasked with not only undertaking the most extensive of investigations but also expected to continue with her own normal duties as a senior member of the Respondent's Social Care Team. I was informed by Counsel for the Respondent during this proceeding that the Respondent has now reviewed that approach and now uses external investigators. The question of course then becomes as to whether that delay can go to the victimisation claim³ or indeed the constructive unfair dismissal claim, and to which I shall in due course return.

19. That brings in the suspension⁴. The terms precluded the Claimant from having contact with any service user past or present. Part of his claim of discrimination is that this was unreasonable and caused him unique distress in that it meant that he was thereby precluded from participation in the deaf community of Derby. I gather that is because most if not all would at sometime have been assisted by social services or still were. The Respondent counters that it was essential in order to safeguard service users given the scale of what had emerged and given that he had improperly made contract with DA albeit he was no longer under the care of the Respondent having been transferred to Derbyshire CC. Prima facie for reasons I hope are now plain and

² Both Counsel provided me with written submissions which I have had close regard to.

³ Detriment 4 and 6 as per C Counsel submissions and flowing from the UNISON Statement of Case submitted at the start of the disciplinary hearing.

⁴ Detriment 5.

from the documentation before me, there is force in the contention of the Respondent. By the same token, prima facie as to constructive dismissal it was acting with reasonable and proper cause.

20. On 14 November 2019 there commenced a chain of correspondence between the senior external trade union official from UNISON now seized with this case for the Claimant, Barbara McKenna, and initially Emily Freeman (EF) to the effect that the Claimant would need access to the database i.e. his laptop etc, to retrieve documentation in his defence and which he had not been permitted to do in terms of the details of his suspension. Part of the Claimant's case is that EF's involvement in that issue goes to her being a victimiser stemming from the prohibited act namely the 1st ET1 and the desire to victimise the Claimant in terms of soliciting of evidence against him post its settlement and the way in which the investigation was conducted; and that this flows through to what then happened on the issue of access to documentation⁵. The correspondence trail on this issue can be found commencing circa Bp1106. But I note (Bp1108 is an example) that EF was sympathetic to the Claimant's request and was working towards a way in which this could be facilitated i.e. Bp 1109. But that approach was overruled and access was denied by Liz Best (LB) who is Strategic HR Manager in the Respondent's Corporate Resources Directorate. Also involved by this stage was Sarah Cook (SC) also of HR. It follows that the documentation flies in the face of EF being instrumental in that decision. The issue of denial of access is the first detriment that Ms McKenna was relying upon in her statement of case at the commencement of the disciplinary hearing 21 January 2020.

21. The second contention by now being made is that the terms of the Claimant's suspension should be relaxed so that at least he was able to use the services of KD. That was granted but otherwise the suspension terms were not changed. The disciplinary hearing had been intended to start in November 2019 but was put back at the request of Ms McKenna because obviously given the sheer size of the investigation report and the Claimant's disability, he needed more time in which to prepare; and then of course there was this issue of being denied access to the data base, albeit the Respondent then sent documents heavily redacted but not translated⁶ 3 days before the main hearing.

22. The hearing itself started on 22 January 2020. The Chair was Kirsty McMillan, she is a Director of Adults Social Care, Social Services. Unison had objected to her chairing on the basis of her purported friendship with EF. Its objection was overruled. That decision dated 23 December 2019 (see Bp1139) was not taken by EF but by VM. Stopping there, the Claimant up to now, and also reflected in his Counsel's submissions, has focussed upon that that the conspirators by way of victimisation were primarily EF, SD and LK and because they would have known of ET1 no 1 and the settlement at the time they undertook the investigation starting with the emails coming in by way of concerns from KA the HR Advisor at Denby Pottery where service user DA worked (see Bp1089).

23. And thus, going back to the Chronology, the disciplinary hearing had to stop on

⁵ Detriment 1.

⁶ I understand this means by way of BSL interpretation.

21 January 2020 and I have said as to why. And there then became another issue which was how it was going to proceed because of the onset of the Corona pandemic⁷. There was a series of correspondence commencing on 18 March 2020 on the issue between Ms McKenna of UNISON and the Respondent led from what I can see by in particular Liz Best, Strategic HR Manager. Put at its simplest UNISON argued that it would have to all take place by way of a live hearing given the complications of needing BSL Signers throughout. Not just for the Claimant but because his intention was that the Respondent be required to call inter alia the service users such as DA. The Respondent's stance was that this would be logically impossible given the impact of Corona and the need to assemble these witnesses and deploy BSL Signers, and that the best approach in what would be obviously a highly unusual and complicated exercise was to deal with the evidence by way of written questions and answers. UNISON objected pointing out that there were places in Derby such as the headquarters of the Respondent or a nearby conference centre, which could be used for the purposes of a continuous hearing rather than one that what staggered over what could take some months. Matters reached an impasse. The Respondent would not budge and therefore insisted the matter go ahead in the way that it intended. It reiterated its stance again on 25 September stating that the hearing would be staggered over a period commencing on 12 October 2020 and hopefully ending on 5 March 2021.

24. The Claimant resigned on 7 October 2020. He commenced ACAS early conciliation and then presented his claim (ET1 no 2) to the Tribunal on 5 February 2020 whereat he alleged that the chain of events which I have now rehearsed constituted victimisation pursuant to section 27 of the Equality Act 2010 (EqA) the protected act relied upon being ET1 no 1. The Respondent provided its detailed grounds of response which I have touched upon on 11 March 2021. I held the Case Management Hearing to which I have now referred and circa that time Claire Davenport (CD) issued her very detailed decision upholding the allegations and as I have already stated confirming that had the Claimant still been employed, he would have been summarily dismissed. Furthermore, that the disciplinary proceeding had in any event had to continue post his resignation because of the safeguarding issues raised and the need to then report the findings to SWE.

Law Engaged and issues

25. As to section 27 the definition is set out by Counsel for the Claimant in her written submissions at paragraph 1. The issue for the main Tribunal of course would therefore be whether following upon the protected act was the Claimant subjected to the detriment of obviously the disciplinary investigation and thence what ensued because he had done that protected act including the prolonged suspension. That is the core point. The initial burden of proof, in effect to establish a prima facie case, rests with the Claimant.

26. The second claim is one of constructive unfair dismissal pursuant to s95 of the Employment Rights Act 1996 (the ERA).. The legal framework is again clearly set out

⁷ Detriments 7 and 8.

by Ms Crawshaw-Williams in her submissions commencing at paragraph 10. Her having recited the authorities of which I am well aware, the issue is did the Respondent in terms of the actions which I have now rehearsed act without reasonable and proper cause thus in essence fundamentally destroying the implied term of trust and confidence, the last straw of course being the refusal to budge on the way in which the disciplinary hearing would continue. The burden of proof in that respect of course lies with the Claimant.

27. That brings me to the provisions as to strike out. Engaged is Rule 37(1)(a) of the Employment Tribunals 2013 Rules of Procedure thus; -

“(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;

...”⁸

28. It is to be noted that strike out does not to have to be of the whole of the claim, it might just be part of it.

29. As to ordering a Deposit engaged is Rule 39(1); -

“(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim⁹ or response has little reasonable prospect 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.”

30. The importance of the provision as to making a Deposit Order is that albeit the amount ordered payable might be low having taken account of a Claimant’s means, if the Claimant were to not succeed on that claim before the Tribunal and for the same reasons given for making the deposit order, then he is at risk of paying costs because the first stage of the costs threshold test is thereby met.

31. As to the authorities on strike out these are rehearsed by Counsel for the Claimant in her submissions. I am well aware of the line of authority commencing with ***Anyanwu v Southbank Students Union [2001] ICR391 HL*** and that to strike out is an exceptional course of action. Furthermore of the dicta of Kay LJ¹⁰ and where there is

“a crucial core of disputed facts: that is not susceptible to determination other than by hearing and evaluating the evidence”.

But of course, he also opined that an example of an exception to that “rule” might be

“where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation”.

⁸ My emphasis

⁹ My emphasis

¹⁰ *Ezias v North Glamorgan NHS Trust (2007) I.C.R. 1126 CA* as per paragraph 6 of her submissions:

32. Ms Smeaton for the Respondent in her written submissions has referred me to two authorities which expand upon that. These are: -

32.1 **AMB Amro Management Services Ltd (1) and Royal Bank of Scotland (2) v Mr G Hogban UKEAT/026/09/DM** per the Honourable Mr Justice Underhill as he then was.

32.2 **Ahir v British Airways Plc [2017] EWCA Civ 1392** where again the leading Judgment was given by Lord Justice Underhill as he by then had become. Encapsulated it does not follow that a claim may not be struck out if there might be something that could be a disputed fact. Thus, at paragraph 16:

“...Employment Tribunal should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of Judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule... . Nevertheless, it remains the case the hurdle is high, and specifically that it is higher than the test for making of a Deposit Order, which is that it should be “little reasonable prospect of success.”

And paragraph 19:

“I have of course twice used the phrase “on the face of it”. That involves the obvious repose that the whole problem with a strike out is that the Appellant has no chance to explore what may lie beneath the surface, in particular, by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, when there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was at least, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it”.

33. That very much flowed from an observation that Lord Justice Underhill made in the AMB Amro case and where he seems to have preferred the argument of Mr Thomas Linden QC at paragraph 13 cross referenced to paragraph 15. Submitted was: *“it is not legitimate to allow an apparently hopeless case to proceed to trial and hope that “something may turn up” during cross examination: there must be reason to believe that there may be matters that can be put to the relevant witness which might cause him to acknowledge, or the court or tribunal in event to conclude, that the facts were as the claimant allege”*: He made reference to the observations of Lord Hobhouse in **“Three Rivers District Council v Bank of England (3) [2003] 2AC1**, at p284A-B: and thus at paragraph 15 inter alia as

follows: *“In my Judgment the prospect that the Claimant could prove a prima facie case (in this case age discrimination) is indeed **fanciful**¹¹ for the reasons advanced by Mr Linden...”*

34. I also observe as per paragraph 16 that if I was to strike out the victimisation claim even if it might not reduce the length of what is otherwise going to be a very substantial hearing, it would be right so to do if it has no reasonable prospect of success and because it limits the scope of the Claimant’s claim for compensation were he to win on the remaining constructive unfair dismissal claim. This is because absent the victimisation claim and he cannot claim compensation for injury to feelings or losses of earnings which exceed the statutory cap. In this case the Claimant seems to be claiming for what in effect would be career loss of earnings, subject of course to the decision of Social Work England which will take some time to be made.

Core findings taken from the documentation before me and factoring in submissions

The DA Issue

35. DA is under the care of Derbyshire County Council (DCC) social services and not the Respondent. His care had been transferred over to it from the Respondent following a reorganisation circa 2014 latest. Prior to that transfer his Social Worker in terms of the Deaf Department of the Respondent’s Social Services Team was the Claimant. All the records of DA, which of course are highly confidential, had transferred across to DCC. But the Claimant had kept the phone number of the Claimant’s mother – BA.

36. HN was his assigned support worker obviously experienced in working with the deaf and a BSL signer. The evidence is that the Claimant was very happy with HN (including see her statement to EF at Bp 269). Putting the case together and bringing in the combined evidence including that of KD, an email appears to have come into possession of KD purportedly written by DA requesting the assistance of the Claimant viz a change in his interpreter arrangements and in that respect that his ACW budget be handled by the Claimant. But KD was suspicious of that email. He did not believe that it had actually come from DA for reasons which he makes plain including the intellectual capacity of DA to write such an email. As to contact therefore having been initiated by DA in terms of the assistance of the Claimant, the evidence is that KA at Denby Pottery was extremely concerned at the overtures being made by the Claimant viz emails circa 23 October 2017 to that effect. These fly in the face of DA having initiated the contact. And she made plain to the Claimant on 24 October having spoken to DA and his direct manager, that he didn’t want to change interpreters or have contact with the Claimant. He didn’t understand why the contact was being made and he did not therefore want the offer of assistance from the Claimant. Yet the Claimant persisted and made contact with DA and indeed his

¹¹ My emphasis.

mother (BA) and on one of three occasions may have seen the Claimant on his own. KA was so concerned at what was going on that she therefore complained to the Respondent via LK as a Lead Manager on 26 October 2017. Bear in mind that DA is obviously highly vulnerable.

37. In that respect and in terms of concern for the Respondent, taking the combined evidence of KA;DA;BA; KD and to some extent the Claimant gathered in the first interview with him, and the overwhelming weight of that evidence is that the Claimant in his contact with DA and KA and BA raised that there were complaints that DA had been sexually harassing or at least behaving inappropriately to HN and that he had a history in that respect and that HN had complained to him. Cross reference to HN (Bp 269) and she is absolutely clear in her statement that she had never raised any such concern and indeed had no concerns whatsoever viz supporting DA. And piecing back in BA, the evidence is that the Claimant persisted in his request causing DA distress and that DA signalled his discomfort in terms of body language which can be associated with a deaf person communicating his disquiet.

38. Then factor in the Claimant's interface to De Star and his brother Irfan, and the evidence that the Respondent had including from the interviews with the Claimant and the background provided by MA and KD and indeed HN: The Claimant did have an involvement with De Star despite that he might say that he did not. The Company had been registered at his home. It appears that his wife may also have had involvement in it. And when Irfan decided to travel abroad, and they may have had a fall out, the evidence is that the Claimant went about getting service users such as DA to switch their ACW support from the then interpreter over to the Claimant including that he would seek to get them more hours. The inference to be drawn from all of that is that the Claimant did have an improper motive in what he was doing. And of course, he had no business contacting DA using BA's phone number provided as his carer and which he should no longer have kept without her consent. And the weight of the evidence from the documentation ie BA, is that when he contacted them it was "out of the blue". Bear in mind that the Claimant on his own admission is very influential role in the Derby blind community.

39. Therefore it would logically follow that on the weight of the evidence that the Respondent had, it would be failing in its duty in terms of the safeguarding of DA to not take the matter further forward. And the decision so to do came from VN and PS not LK or SD. Thus the Claimant will have to establish a widespread conspiracy to do him down because of ET1 no 1 and post its settlement, in a scenario where the evidence has per the statements taken and other documentation obtained by the Respondent is that it would have been very seriously in a dereliction of its safeguarding duties if it had failed to act.

40. Furthermore no evidence has ever been put forward by the Claimant whether it be by his trade union representative or indeed in the further and better particulars to the effect that such as VM and PS were motivated because the Claimant had brought that first claim to Tribunal. The timings maybe unfortunate in terms of settlement and the investigation but the **inescapable incontrovertible evidence** is

that the complaint viz DA from KA came **before the settlement**.¹² And had to be taken forward because of the safeguarding issues that it raised.

41. The suggestion advanced before me on behalf of the Claimant that it is normal policy to always speak to the Social Worker first before going to the service user on such a serious complaint flies in the face of the Respondent's own policies. In that respect I am with Counsel for the Respondent and reference as to what needs to be done and how safeguarding should always come first and thus in these circumstances the first port of call in terms of investigation is with the service user (see inter alia the policy at Bp 803).

42. That then brings in the contention of the Claimant backed by a witness in the bundle in terms of the statement of case for him at the start of the disciplinary hearing, that SD is not "a deaf professional".¹³ Suffice to say, as to which, for example, see the findings of Claire Davenport, SD has been a Social Worker focussing on the deaf for some 40 years and she is a BSL Signer. There may well be some debate in the signing community as to what is and what is not a "deaf professional", but on the face of it SD was clearly equipped to undertake interpretation and thus interview inter alia deaf persons for the purpose of the investigation as directed by her superiors. It follows that the Claimant is in the greatest possible difficulty in arguing that SD is incapable of undertaking interviews with the profoundly deaf because she is not allegedly a "deaf professional" and furthermore, as he clearly is alleging, that she has inappropriately interpreted thus recording untrue evidence as part of the conspiracy. But, and by way of example, looking at the record of the interview, DA when he was interviewed had with him KA and at least 3 other people. SD conducted it in a scrupulously nonleading way. And he signed that interview as correct. Second there is the interview with his mother, who is not deaf, and which corroborates totally her son. Furthermore, there is in terms of what the Respondent had at the material time the corroborative evidence on this topic of MA, KD and HN.

43. Thus, it follows that to allege that this was an act of victimisation is "fanciful".

44. As to AM his complaint was made on 11 October 2017 see Bp339 and it was logged as such. That complaint has similarities to that relating to DA i.e. over the issue of ACW budget. AJ and his wife did not want that the ACW budget anymore but the Claimant was insistent: "refused to cancel it will not give a reason why" and that AJ "does not want Kamran as his Social Worker and does not want to be case managed by the Deaf Services Team he says he wants a Social Worker that isn't part of Deaf Services Team". It is essential to point out that this complaint was not solicited: it is his wife phoning in and it is then logged as is to be expected.

45. There is then the complaint raised by Nicola Berry (NB) a Welfare Reform Officer on 22 November 2017 as to issues relating to the treatment of service user DB. She is not in the team that was the subject of the grievance and ET1(1). At present it is not suggested that she would be a conspirator in that sense. DB is obviously profoundly disabled as to which see Bp315 and not just in respect of his deafness. He also has problems signing in BSL as he is Jamaican and will use the American system but is hampered by his learning disabilities. All that needs to be

¹² My emphasis.

¹³ This brings in detriments 2 and 3.

said is that she was very concerned indeed of the attitude of the Claimant towards DB on a visit to a Doctors surgery to which she accompanied. This is a second theme of the complaints which has to do with the Claimant's overbearing manner on occasion towards these service users. She refers in terms of this attitude, and as an example, to his banging his fist on the table at another meeting with DB.

46. Now it maybe that in due course a witness Liz Gallear did not corroborate NB which is Bp325. Now of course if the Respondent was about victimising the Claimant via EF post to her appointment as Investigating Officer, then one would not expect to see that statement in her investigation report: but it was. And again, on the face of it the Respondent would be obliged to look into the issues raised by NB. And then I have already referred to the statement provided it seems of his own volition of the Support Workers/Interpreter, Mohammed Ahmed, of 3 January 2018 see Bp335 which raises similar concerns this time in relation to service user RN..

47. Suffice to say, and these are but examples, that I don't need to take matters any further forward for the purposes of my analysis. The evidence is very strong indeed that there were serious shortcomings by the Claimant as to his treatment of service users and in relation to some of them a strong inference that he was misusing his position for improper purposes and that he had failed to disclose that he was so doing.

48. As to the issue of his undertaking work for One to One Support Services and which under the Respondents policies he would be obliged to inform them about, the Claimant's position is he didn't realise he had to apropos the policy but in any event as far as he understood it at least one other social worker did the same thing. As an issue in itself that probably may not have warranted more than words of caution, but of course it has to be seen in the overall scope of matters.

49. The final point to make is that the Claimant raises a comparator namely DG as to which see the further and better particulars, but as to DG it is to be noted that on one of those issues he was suspended and then post investigation and the allegation being dropped reinstated, and that otherwise none of those allegations relate to the misuse of his position in relation to contacting such as DA when the latter is not in the service user of the Respondent or seeking to get a change in an ACW budget prima facie to his or another's advantage.

Summary as to the s27 victimisation claim interface to the constructive unfair dismissal claim

50. Thus upon the above analysis:

50.1 The DA issue did not come about by way of improper soliciting by the Respondent so has to cause the onset of alleged victimisation. Therefore, that argument, which was initially present in the ET1 grounds is untenable.

50. 2 The Respondent in terms of its safeguarding responsibilities was obliged to follow it through. The evidence is that there was no pressure placed upon DA or with his mother in their interviews and there was corroborative evidence from inter alia KD and MA As to HN, a very troubling issue for any employer such as the Respondent would be the Claimant seeking to raise the sexual harassment issue as a reason for DA changing his interpreter i.e. HN the clear inference

being that DA was a risk to female interpreters and which was totally refuted by HN. Those are extremely serious issues which of course could not but justify a Respondent such as the Respondent with its safeguarding duties having to escalate the matter. Turn it around another way it does not permit of any inference of victimisation. On the face of the papers its fanciful and doomed to fail.

50.3. As to the circumstances by which some of the other complaints came to light, it is the classic scenario as Counsel for the Respondent put it of when the relevant Social Worker the subject of investigation has been removed from working with the relevant service users and matters come to light in the course of contact with other social workers ie SD. Counsel for the Claimant submits that more may be revealed as to improper motivation when SD is cross examined . But it is to be noted that in the detailed opening statement of case by Ms McKenna of UNISON for the Claimant at the disciplinary hearing it was never suggested that SD was acting as a victimiser herself with knowledge of the grievance or the ET1. The thrust rather was on that she wasn't the person equipped to the job because she wasn't "a deaf professional". As to why some of these service users were not interviewed themselves reliance instead being on witnesses such as NB, into the equation account has to be taken of their profound disabilities.

50.4 In those circumstances to now suggest as the Claimant does that despite the most apparent safeguarding and other concerns, the investigation was all a conspiracy to victimise him and which in turn would also mean to take the matter though to a disciplinary hearing was part of that conspiracy and which engages senior management within the Respondent, and with really nothing of substance to back it up, is fanciful. Furthermore in the context the Respondent was clearly prima facie not acting without reasonable and proper cause.

50.5 By the same token the Respondent would have been failing in its professional duties if it had not suspended the Claimant in the circumstances. These issues were too serious and there was a reasonable prospect that the Claimant might interfere with the investigation. The extension of that supervision through to the commencement of the disciplinary process could in that sense also therefore be justified. There was a degree a relaxation to the suspension at his UNISON's request in November 2019 whereby he was able to have contact with KD who of course he uses as his personal BSL Interpreter.

50.6 I have already pointed out that the decision to not permit the Claimant his request in terms of access to his laptop emails etc was not made by EF. It thus cannot go to her being a victimiser. The clear evidence is that the decision not to grant the Claimant's request was made by Sarah Cook and then Liz Best, Strategic HR Manager at Corporate Resources Directorate. The Claimant has advanced no argument and certainly not named her in the further and better particulars as a player on the victimisation front. And going back to my point about the fanciful and this every increasing number of alleged conspirators and with no particularisation as to why, it is therefore on the face of it is fanciful. Furthermore, on the face of it there would be clear concerns viz allowing access given the nature of some of the allegations and misuse of Data. Thus to go down the route of not allowing him access on the advice of the Respondent's Data

Protection Department, but instead deal with his requests by providing him with the documentation, albeit in redacted format, is not acting without reasonable and proper cause.

50.7 As to the protected investigation and the ensuing delay in getting to the stage of a disciplinary hearing, this does concern me. Interviews ended in August 2018. The next activity seems to have been data gathering and “screening numerous e-mails” in January 2019. She took annual leave in parts of June and July. But that on the face of it should not have delayed completion of the report for so long until 8 October 2019. I have already referred to her being overburdened in terms of having to cope with her normal job and I can see that it would have taken a great deal of time to put together such a huge report. On the face of it for the reasons I have already given I conclude that the Claimant’s has no reasonable prospect of being able to submit that the is somehow or another the fruit of a poisoned victimisation tree. However, when it comes to the constructive unfair dismissal claim I would make the following observation namely that there is a duty on the Respondent given its size and resources and the nature and implications of the allegations, to act with reasonable dispatch and particularly bearing in mind the ordeal for the individual under investigation and de-skilling and which can occur with lengthy suspensions. In my extensive experience all too frequently that is overlooked by such as local authorities or the NHS. Therefore, there is an issue as to whether or not the Respondent acted with reasonable and proper cause in terms of that delay. I conclude that prima facie if it had been prioritised the EF report would have been concluded by the end of 2018. Thus there is a case to answer as to whether the delay thereafter was without reasonable and proper cause. **It therefore goes forward as the first surviving element of the to the constructive unfair dismissal claim.**

50.8 That brings me to the issue as to the way forward for the disciplinary hearing post its being adjourned on 25 January 2020 For reasons I have already given none of the alleged conspirator’s ie LK; SD and EF were involved. For the reasons I have already given and bearing in mind it has not been particularised as victimisation as such, it is back to the fanciful. But as to the Respondent possibly acting without reasonable and proper cause, it is clear from the documents that UNISON put up good reasons why the Respondent could deal with this matter by way of a live hearing and expedite it. There is a counter argument as put forward by Ms Smeaton that throughout the period that we are dealing with in 2020 local authorities such as the Respondent were restricted in what they could do because of the pandemic. **But I will leave that issue to the main hearing as a triable issue as to constructive dismissal only.**

50.9. The disciplinary findings of CD are not part of the claim and thus are not engaged.

Conclusion

51. It follows that I conclude from my reasoning that the claim based upon victimisation pursuant to section 27 has no reasonable prospect of success. It is dismissed.

52. Similarly those elements of the Constructive unfair dismissal claim up to the end of 2018 are dismissed as having no reasonable prospect of success.

53. But those elements thereafter focussing on the delay and thence issues relating as to the way forward with the hearing and ending with the Claimant's resignation are **not struck out**. Furthermore there are triable issues so as to mean that I will not make a deposit order as that residual claim cannot be said to have only little reasonable prospect of success.

The way forward

54. Given my decision, that which remains will be heard by a Judge sitting alone. Also the hearing will be much shorter given the remaining issues.

55. Therefore what I now intend to do is to use the date already given to the parties namely **Friday 10 December 2021** which would have been needed if I was going to order a Deposit¹⁴ to now be converted to a Telephone Case Management Hearing as all I am left now to do is to give directions for the main hearing. This is already scheduled **for the 3 days commencing Monday 11 April 2022**.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. There will be Telephone Case Management hearing **on Friday 10 December 2021 at 10.00am for 90 minutes before this Judge**. The agenda is to discuss the current time limit for the main hearing scheduled **to commence on Monday 11 April 2022** and to otherwise give final directions for that main hearing which will now be heard by a Judge sitting alone.

To take part you should telephone **0333 300 1440** on time and, when prompted, enter the access code **2744001#**

[Please note that if you intend to dial into the telephone hearing from a mobile phone, higher rates apply and you may wish to check the call rate with your service provider first.]

2. To that end the parties are expected to be able to discuss and agree their proposed directions for my consideration.

¹⁴ As would require assessment of means.

Employment Judge P Britton

Date: 7 December 2021

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