EMPLOYMENT TRIBUNALS

Claimant: Mr P Bailey

Respondent: Chief Constable of Greater Manchester Police

Heard at: Manchester **On:** 23 November 2018

Before: Employment Judge Sherratt
Ms L Atkinson
Mrs S Ensell

REPRESENTATION:

Claimant: Ms J Ferrario, Counsel
Respondent: Mr S Gorton, One of Her Majesty's Counsel

RESERVED JUDGMENT ON APPLICATION FOR COSTS

The judgment of the Tribunal is that the respondent's application for an order for costs is dismissed.

REASONS

Background

1. The claimant brought his claim in February 2013 alleging direct discrimination and victimisation. It was alleged that he was treated less favourably because of the protected characteristic of race on the basis of items listed in the Grounds of Complaint at (a)-(e) inclusive and then at (f) it was alleged that the respondent had failed to investigate the claimant's complaint about these matters properly. The complaint went on to raise allegations of victimisation again setting out the same matters (a)-(e) and then at (f) alleging that the respondent failed to investigate the claimant's complaint about these matters properly.

2. The claims came before Employment Judge Holmes sitting with non-legal members in September and November of 2014 and January of 2015, resulting in a Judgment sent to the parties on 10 February 2015. The claimant succeeded before the Holmes Tribunal.

3. The respondent appealed to the Employment Appeal Tribunal and the judgment of Mrs Elisabeth Laing was handed down on 3 December 2015. The appeal was dismissed.

4. The respondent appealed to the Court of Appeal. Lady Justice Gloster, Lord Justice Underhill and Sir Patrick Elias in a judgment handed down on 14 June 2017 allowed the appeal save in respect of what was referred to as item (g), which were the allegations formerly known as item(f).

5. In the Court of Appeal both parties received some adverse comment in relation to item (g). In the words of Lord Justice Underhill:

> "…The arguments before us were bedevilled by the failure of the claimant either in the ET or the EAT to specify with reference to the relevant provisions what more it is said that she could or should have done. The respondent is also open to criticism for not seeking to clarify the position and, as will appear below, choosing to interpret the nature of the claimant's criticism in a surprisingly restricted way."

6. At paragraph 75:

> "It is very regrettable that the relevant statutory material was not put before the ET and that issues about their detailed application only emerged in the late and piecemeal way described above. As a result, entirely pardonably, the ET's understanding of the relevant regimes was garbled…I shall have to consider below to what extent this problem vitiates the Tribunal's reasoning and conclusion. Mr Gilroy acknowledged that the parties' failure to assist the Tribunal in this respect was a matter of mutual embarrassment."

7. Mr P Gilroy QC represented the claimant in the Court of Appeal and Mr S Gorton QC, who appeared before us today, represented the Chief Constable.

8. In the course of the judgment of the Court of Appeal there was reference to "this bog of confusion" and the end result of the exercise was the conclusion that there were flaws in the process by which the Tribunal drew the inference on which it relied and explained its reasons for doing so. The outcome of the appeal was that matter would be remitted to a freshly constituted Employment Tribunal which would have to have a further hearing on the facts but at least, in the view of the Court of Appeal, the issues were comparatively limited.

9. The matter having been remitted, Regional Employment Judge Parkin held a preliminary hearing on 13 September 2017 in which he provided for the claimant (by 25 September 2017), "to provide full particulars of his claims of direct discrimination and victimisation in respect of the remaining issue (g) to the Tribunal and the respondent, such particulars expressly to include what he contends ACC Sheard should have done but did not do and what matters would entitle the Tribunal to draw the adverse inference of unlawful discrimination or victimisation".

10. In his notes of discussion, the Regional Employment Judge noted that:

> "Notwithstanding the successful appeal to the Court of Appeal and remittal the claimant's case on this remaining issue is still not absolutely clear. He needs

> to provide full particulars of the alleged direct discrimination and victimisation in order that the respondent fully understands the case against it and the Tribunal can case manage it and proceed to a fair hearing. The respondent will thereafter decide whether to pursue his application for a deposit order to be made as a condition of the claimant proceeding with the remaining claim."

11. The claimant provided further particulars of his claim on 26 September 2017 over six pages in anticipation of a further hearing before Regional Employment Judge Parkin on 14 November 2017. At this hearing the claimant was represented by Ms J Connolly of counsel and the respondent again by Mr Gorton. Ms Connolly provided an addition to the further particulars which was a new paragraph 28. This late amendment was allowed. The respondent's application for the claimant to be ordered to pay a deposit as a condition of continuing with his claim was refused. A final hearing was listed before a new Tribunal sitting from Monday 2 to Friday 6 July 2018.

12. Regional Employment Judge Parkin summarised matters in his discussion and reasons, including a paragraph on the claimant's further particulars and their amendment, which he noted was made late, during the course of counsel's submissions at his hearing, but in his judgment it was appropriate to permit the amendment to enable the claimant's case to be put fully before the Tribunal at that hearing and the final liability hearing. The respondent had earlier urged in correspondence that the further particulars were deficient in failing to deal with how adverse inferences could be drawn. Claimant's counsel had fully made good the deficiency at the hearing.

13. With regard to the failed application for a deposit order, the Regional Employment Judge gave full reasons for reaching his conclusion, noting that:

> "Although the claimant's case does not appear to be the strongest it is not sufficiently weak as to determine that it or its supporting allegations or arguments have little reasonable prospect of success and to require a deposit to be paid. Further time has been spent upon determining this preliminary application. It is now imperative that the listed hearing be retained, for the new Tribunal panel to hear the oral evidence, consider the documentary evidence and deliberate after hearing the parties' submissions, so that there can be finality on this remaining claim of discrimination and victimisation brought by the claimant."

14. At the hearing in July this Tribunal found against the claimant, giving an oral judgment to this effect. As it happened, the Tribunal did not sit on 5 July so the case was dealt with in four not five days.

15. Mr Gorton indicated an intention to make an application for costs and provision was made for this to be done in writing with the claimant thereafter responding to the application in writing.

16. The respondent's application for costs was set out on two pages, arguing that the claimant unreasonably pursued a case for race discrimination and victimisation that he knew or ought to have known was not sustainable. The following points were relied on:

(1) Statutory regime – the case put forward by the claimant has throughout been inherently uncertain on what it was he was alleging that ACC Zoe Sheard was obliged to do or ought to have done but did not. At the hearing there was an express abandonment of the case on recordable conduct. It was unreasonable for the claimant to set out this case and abandon it before the Employment Tribunal.

(2) The statutory questionnaire paragraph 27 answer – the claimant's case has changed and at times has been wholly contradictory. According to the note of REJ Parkin, this issue was at the front of the claimant's submissions but at the final hearing this issue was abandoned and Ms Sheard was not cross examined on it. Abandoning a central tenet of his case nearly six years after the relevant events having later identified the matter before the Regional Employment Judge is unreasonable conduct.

(3) The bog of confusion on the statutory regime was the reason why the claimant was asked to set out his case definitively. Although the claimant set out his case, none of it was advanced before the Employment Tribunal but no explanation was provided as to why not.

(4) Other aspects of his case were advanced on paper and then abandoned before the Employment Tribunal, such as an allegation of institutional racism. This was not put in cross examination or advanced in argument.

(5) A wholly new case emerged in cross examination of Ms Sheard suggesting that she was consciously motivated due to her former marriage to another Assistant Chief Constable who was involved in agreeing a compromise agreement with the claimant in 2009, and later in her relationship with another police officer who had in some way fallen out with the claimant in 2009 with such matters giving her motivation to treat the claimant negatively. This wholly new case was not raised until her cross examination when in the submission of the respondent it should have been in the amended pleading. This was in any event a wholly misconceived suggestion having nothing to do with the protected characteristic of race and even less to do with a protected act in 2007-2008. This became the bedrock of his case in July 2018.

(6) The wholly new case was put to Ms Sheard on the basis that she would surrender or subdue her professionalism out of loyalty to her male partners. This was insulting to her and she was more than justified in asking why her private life was the subject of cross examination.

(7) The claimant made a fresh suggestion in cross examination that Ms Sheard ought to have sought advice from the Head of the Professional Standards Board. This was new but misconceived. It did not assist the Tribunal in considering whether the protected characteristic of race was relevant to the issue of failure to investigate.

(8) Investigation – the claimant’s case was to suggest that Ms Sheard failed to investigate the complaint. Nothing could be further from reality. She did investigate it.

17. Summarising the application, the claimant should have reflected on matters after the Court of Appeal judgment in 2017 and withdrawn his claims; instead he ploughed on without rational reflection when his claim called out for that. He has picked up points to keep his claim going and then promptly abandoned them. Finally, he has lighted on late thought up, ill-conceived points that should not have been deployed. Cumulatively this amounts to unreasonable conduct.

18. The solicitors acting for the claimant prepared and served a written response to the application for costs inviting the Tribunal to focus on whether the claimant had conducted the proceedings unreasonably or not. They summarised the points put forward on behalf of the respondent as follows:

(1) The claimant abandoned parts of his case before the Tribunal in that they were allegedly not put to Zoe Sheard in cross examination.

(2) There was a “bog of confusion” and contradiction in the claimant's mind as to what the applicable statutory regime was.

(3) A wholly new case was put to Zoe Sheard in cross examination.

19. The claimant resisted these arguments and criticisms, pointing out that the remitted hearing before the Tribunal was restricted to item (g), submitting that contrary to what the respondent now seeks to argue the claimant's case was that there had never been any doubt as to the underlying basis of his claim in relation to part (g), noting from the judgment of the Court of Appeal where it was acknowledged that:

> “In broad terms it is clear that the gist of claim (g) is that ACC Sheard was wrong not to do more than she did in response to the complaint.”

20. It noted that the Court of Appeal referred to criticism being open towards the respondent for not seeking to clarify the position and choosing to interpret the nature of the claimant's criticism in a surprisingly restricted way. The response went on to deal with the two regimes governing police complaints, suggesting that they were succinctly set out in his further particulars and addressed in his witness statements and closing submissions thus none of the points were abandoned. In summary it was not accepted that any parts of the case were abandoned during the proceedings.

21. As to the wholly new case that was allegedly put under cross examination, the claimant’s case is that it was wholly appropriate for such matters to be put under cross examination because ACC Sheard raised matters in her second witness statement (to this Tribunal) when they had not previously been put by the respondent in its pleaded case and were not in her previous statement to the Holmes Tribunal. The claimant was bringing a case of victimisation with a protected act relied upon being previous Tribunal complaints. Her second statement suggested she had never come across the claimant in her 25 years of service and was not aware of any previous Tribunal claim, thus suggesting she was not motivated by knowledge of protected acts. In their submission it was wholly appropriate for the claimant to cross examine Ms Sheard on this contention, and it was not a new case. Such cross examination was crucial.

22. The response went on to note that the claimant was initially successful before the Holmes Tribunal and the Employment Appeal Tribunal. Point (g) was remitted to a differently constituted Tribunal. The application for a deposit order was not successful. In all of these circumstances the claimant's conduct of the case was not vexatious, abusive, disruptive, unreasonable or misconceived. There were triable issues and a need to hear and adjudicate upon witness evidence to determine a discrimination claim. There is an importance in not discouraging discrimination claims which can only properly be determined having heard the evidence and drawn the necessary inferences.

The Hearing on Friday 23 November 2018

23. Mr Gorton prepared a helpful note on costs and spoke to it. Ms Ferrario made oral submissions by way of reply.

24. There was agreement between the parties that there were essentially three matters for consideration by the Employment Tribunal:

(1) The principle of the award i.e. the grounds for making it under the Rules;

(2) The actual conduct or threshold that justifies or not making the award;

(3) The award itself i.e. quantum including having regard, if it thinks it relevant, to the claimant's ability to pay.

25. We remind ourselves of rule 76 of the 2013 Rules of Procedure:

"(1) A Tribunal may make a costs order…and shall consider whether to do so, where it considers that –

(a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) Any claim or response had no reasonable prospect of success."

Conclusions

26. The claimant's pleaded case was apparent to the respondent by 14 November 2017, particularly where it had been clarified by Ms Connolly, then counsel for the claimant.

27. The parties prepared for the remitted hearing on the basis of the claimant's pleaded case, and ACC Sheard rightly addressed the question of her knowledge of the claimant, arguing that she did not have any knowledge of any protected acts done by the claimant therefore she could not have victimised him when acting in the way that she did when dealing with his complaint.

28. The claimant, having considered this evidence, was right to cross examine Ms Sheard upon it. The cross examination, upon instruction from the claimant to his counsel, went into the private life of Ms Sheard to a greater extent than she might have anticipated.

29. Reflecting on these matters the Tribunal considers that the cross examination was certainly robust but that it did not amount to the claimant acting vexatiously, abusively or otherwise unreasonably in the way in which he conducted the proceedings. Given the content of the witness statement questions had to be asked. In any event the cross examination did not add any significant amount of time to the length of the hearing which, as we have set out above, was concluded within four rather than five days.

30. As to whether the claimant should have given serious consideration to his claim following the handing down of the judgment of the Court of Appeal, we accept that in a discrimination case a claimant's claim can only properly come out when the evidence is tested before the Employment Tribunal.

31. We understand why there was no application to strike out this claim, as it was remitted for further hearing by the Court of Appeal, but there was an application to have a deposit made against the claimant. This did not succeed. This would have, to an extent, supported the claimant and his legal advisers in determining that there was a case to go forward to a full hearing.

32. Given that the way in which the claim was presented before this Tribunal meant that it was dealt with well within the allocated time, with the respondent not being put to any further costs by reason of time wasted, we do not consider that in pursuing his claim before this Tribunal in respect of the remitted hearing the claimant acted in a manner contrary to rule 17 and we do not find that it is appropriate to make a costs order against the claimant in favour of the respondent.

Employment Judge Sherratt

3 December 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

6 December 2018

FOR THE TRIBUNAL OFFICE