EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103225/2018

Preliminary Hearing Held at Aberdeen on 14 January 2019

Employment Judge: Mr A Kemp (sitting alone)

Miss L McGregor	**Claimant** **Represented by** **Mr D McGregor** **Father**
Total Waste Management Alliance Ltd	**Respondents** **Represented by** **Ms J Turner** **Solicitor**

JUDGMENT

1. **The Respondents' application for strike out is granted in respect of a claim of indirect discrimination under section 19, and of harassment under section 26, and in part in respect of a claim of direct discrimination under section 13 and a claim of reasonable adjustments under section 20, all of the Equality Act 2010 , in respect of the protected characteristic of disability as more particularly set out below.**
2. **The Respondents' application for a deposit order is refused.**
3. **The Claimant's Claims under section 15 of the Equality Act 2010, and for harassment on the ground of sex under section 26 of that Act, are dismissed on withdrawal.**
4. **The Claimant's application to amend, save in relation to the claims withdrawn or struck out, is granted.**

5. The Respondents may lodge an amended Response within 14 days of the date of this Judgment if so advised.

6. The Claim in respect of work of equal value is sisted.

REASONS

Introduction

1. This Preliminary Hearing was arranged to consider the Respondents' application for strike out, which failing for a deposit order, and for case management.

2. This case has had four previous Preliminary Hearings, with the most recent being that by EJ Hendry leading to a Judgment registered on 2 November 2018. That Judgment is lengthy, sets out the law in detail, and gave clear guidance to the Claimant on what required to be pled for a claim to be able to proceed. Many individual matters were struck out at that stage.

3. On 15 November 2018 the Claimant's representative, who is her father and someone not legally qualified, wrote to the Tribunal with an application to amend the pleadings so that they may be "recast and re-pled" as he put it in a covering email, following that Order.

4. I decided to hear the issue of strike out, or deposit, firstly, then to consider the issue of amendment secondly, but determine matters after having considered both issues, as the amendment of pleadings may affect the determination of their prospects of success. Having heard the submissions, I then considered in detail the papers in the case, in particular the amendment sought by email dated 15 November 2018 and the terms of EJ Hendry's Judgment on 2 November 2018.

Submissions

5. Ms Turner helpfully confirmed that she did not seek any order in respect of the claim for unfair dismissal under section 98(4) of the Employment Rights Act 1996. That claim at least will therefore proceed to a full hearing. Her application for strike out was for all other claims bar that, and if that did not succeed she sought in the alternative a deposit order.

6. Her argument was that, following EJ Hendry's decision dated 2 November 2018 in which some claims had been struck out, an amendment had been tendered but it was still very difficult to tease out what the claims were. The claims under sections 15 and 19 were not arguable. This was a straightforward unfair dismissal claim. The Claimant accepted that she had tested positive for cannabis. The issue was of mitigation. The remaining claims were time-barred and the Tribunal did not have jurisdiction, and separately they had no reasonable prospects of success.

7. She understood that the last act relied on was on 20 December 2017, being when Maureen Smith alerted the Environmental Services manager to ongoing disciplinary proceedings, but that was not a relevant act, and not a part of any continuing act. There had been reference to acts of Mr Bolton, but he had left long before. No claim had been disclosed, or properly pled. The Respondents' position remained in any event that they were not aware of the Claimant's disability.

8. In response Mr McGregor explained that the common factor in acts or omissions was Brian Scott. He set out some of the background as he understood it, and said that Mr Scott ought not to have been the investigating officer as he was not independent. His report had said that there was no evidence that the Claimant had suffered from ADHD but that was a lie. At the disciplinary hearing he had argued with the Claimant and refuted all that she said. The discrimination he argued had continued up to the point of dismissal.

9. Ms Turner argued that the claim under section 13 did not set out what was claimed to have been done on the grounds of disability. In reply Mr McGregor said that it related to being criticised for taking time off and that that could lead to dismissal, and then being given extra work without support. He further alleged that the Claimant was required to attend meetings where harassment had earlier occurred. Following further discussion however he confirmed that the claim under section 13 for the protected characteristic of sex was withdrawn.

10. Similarly following further discussions, Mr McGregor withdrew the claim made under section 15, on the basis that some at least of the arguments fell more properly under section 20.

11. In so far as section 20 was concerned, the claim was for reasonable adjustments as being:

(i) A change of venue to a neutral location, the Claimant alleges was made on 2 February 2018

(ii) Utilising the correct policy for Drugs & Alcohol, with the Claimant alleging that the one used was not one issued to her previously

(iii) Having as investigating officer someone truly independent, rather than Mr Scott who was allegedly not independent.

12. There was also claim for harassment made under section 26. The harassment is alleged to have lasted from 2014 and to have been a continuing act up to the point of dismissal. Mr McGregor confirmed that the claim that this was on ground of sex was withdrawn, and that aspect of the Claim has been dismissed.

13. It is alleged that a Mr Russell Kidd verbally abused the Claimant on 17 May 2017, and that she made a complaint under the relevant Grievance Policy, but that there was no investigation and that one of the managers, Mr Alex Munro, denied having received it. Mr McGregor argued that there was a continuing act in a lack of investigation of such a grievance, and a failure to

follow the appropriate procedures. The argument is that that all led to the Claimant ultimately taking cannabis, which led to the failed drug test and her dismissal.

14. The final aspect of the claim is for equal pay. The claims are for either or both of like work and work of equal value. Three comparators are provided being John Anderson, Alan Bolton and Jim Robertson.

15. Ms Turner did not oppose receipt of the Claimant's amendment once the aspects withdrawn, as above, had been conceded. She did however ask for time to answer that amendment within 14 days, which I have allowed.

The Law

16. A Tribunal may not have jurisdiction to consider a claim if it is not presented timeously. There is no dispute in relation to the claim for unfair dismissal. It does not appear that a time bar issue can arise for the equal pay claim as that continues potentially to point of dismissal. For the discrimination claims the matter is regulated by section 123 of the Equality Act 2010, which provides:

> "**123 Time Limits**
>
> (1) Proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) The period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) Such other period as the employment tribunal thinks just and equitable……
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period"

17. A Tribunal is required to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "**2 Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

18. Rule 37 provides as follows:

> "**37 Striking out**
>
> (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 …….. has no reasonable prospect of success……."

19. Rule 39 provides as follows:

> "**39 Deposit orders**
>
> (1) Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response

has little reasonable prospects 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….."

20. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR*** 694, and further in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

21. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

> "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

22. Lord Hope of Craighead stated at paragraph 37:

> " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly 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 decision 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."

23. Those comments have been held to apply equally to other similar claims, such as to public interest disclosure claims in ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603***. The Court of Appeal considered that such cases ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits (paragraphs 30–32). The following remarks were made at paragraph 29:

> "It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence."

24. In ***Lockley v East North East Homes Leeds UKEAT/511/10*** it was similarly suggested that a tribunal should be slow to strike out such cases because of the additional public interest in such matters. I consider that the same considerations arise in a claim of disability discrimination as made in the present case.

25. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, and becomes an exercise of discretion.

26. That was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392,*** in which Lord Justice Elias stated that

> "Employment Tribunals 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."

27. In relation to deposit orders, the EAT has considered matters in ***Van Rensberg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07***, ***Sharma v New College Nottingham UKEAT/0287/11***, ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14***, ***Hemdan v Ishmail [2017] ICR 486*** and ***Tree v South East Coastal Services Ambulance NHS Trust UKEAT/0043/17***, in the last of which the EAT summarised the law as follows:

"[19] This potential outcome led **Simler J, in *Hemdan v Ishmail [2017] ICR 486 EAT,*** to characterise a Deposit Order as being 'rather like a sword of Damocles hanging over the paying party' (para 10). She then went on to observe that 'Such orders have the potential to restrict rights of access to a fair trial' (para 16). See, to similar effect, ***Sharma v New College Nottingham UKEAT/0287/11*** para 21, where The Honourable Mr Justice Wilkie referred to a Deposit Order being 'potentially fatal' and thus comparable to a Strike-out Order.

[20] Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under r 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in ***Anyanwu v South Bank Students' Union [2001] IRLR 305 HL*** per Lord Steyn at para 24 and per Lord Hope at para 37.

[21] In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated

by the express requirement - see r 39(2) - that the ET shall 'make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit'. An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see ***Hemdan*** at para 11.

[22] Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.

[23] Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see **Wright** at para 34."

Discussion

28. The amendment is very lengthy, and is at times not easy to follow. The allegations date back to November 2014. The amendment included on occasion within a claim under one statutory provision issues that properly arose under a different statutory provision. It is not easy to discern in some parts of the amendment what the claim is, and why. I have however attempted to consider it taking account of the fact that the Claimant's representative, her father, is not legally qualified.

29. There is no application for strike out or deposit order for the claim for unfair dismissal under section 98 of the Employment Rights Act 1996. It will thus be for the Respondents to prove the reason for dismissal. They allege that that

was conduct, and if proved that is potentially a fair reason. Whether or not it is fair is then judged by reference to section 98(4), in respect of which the onus is neutral.

30. The discrimination claims are different. The onus there lies on the Claimant, but if facts are proved from which the Tribunal could decide, in the absence of other explanation, that there had been contravention of one of the provisions, the onus may, if that stage is reached, shift to the Respondents under section 136 to prove that they did not contravene the provision. The relevant facts from which discrimination could be held to have occurred however must be established by the Claimant, and for that to occur there must first be adequate pleading of those facts.

(i) Direct discrimination – section 13

31. I have decided that it is appropriate to strike out the claims for direct disability discrimination under section 13, save in certain respects. Having regard to the terms of EJ Hendry's Judgment, and the pleadings as amended, I consider that there is no reasonable prospect of success for those claims not struck out.

32. The two respects which I have decided do not merit a strike out is that in paragraph 2.0 of the amendment, on page 11, lines 1- 9 ending "contrary dated 29 05 2017", and the final sentence of that paragraph, and the first sentence of paragraph 2.2. I do so on the basis that in each respect the comparator is a hypothetical one. There is reference to a comparator in the final sentence of paragraph 2.0, and although there is no specific comparator stated in 2.2 I consider that it ought to be inferred that the comparator should be as set out in the final sentence of paragraph 2.0 for paragraph 2.2.

33. The allegation in paragraph 2.3 relates to an investigatory meeting, and I do not consider that it has any reasonable prospects of success. The remaining parts of paragraphs 2.0 and 2.2 I consider similarly not to have reasonable

prospects of success. They do not disclose a relevant claim, and indeed were struck out at paragraphs 39 and 40 of EJ Hendry's earlier Judgment.

(ii) Discrimination arising out of disability – section 15

34. The claim of discrimination arising out of disability under section 15 has generally been withdrawn, and is dismissed save for one matter, which relates to paragraph 2.0 referred to above. In his Judgment EJ Hendry indicated that the argument may be either direct discrimination or discrimination arising out of disability, and as that may be a label to attach to pled facts on a matter that is to proceed, I do not strike out that potential alternative argument for those pleadings.

(iii) Indirect discrimination - section 19

35. There are claims of indirect discrimination under section 19 within the amendment, but which appear under the heading of discrimination arising out of disability. They appear at 3.0 to 3.11, at least in part. I do not consider that those claims have any reasonable prospects of success, and they are struck out. The claims are either not adequately pled as ones of indirect discrimination, or fail accurately to identify a provision, criterion or practice, or do not specify the manner in which they unlawfully were applied to the Claimant, or refer to acts which took place well outwith the three month period such that they are on the face of it timebarred with no adequate pleadings either to bring them within section 123(2) such that they would not be timebarred, nor any pleading as to why it would be just and equitable to allow them to be received.

(iv) Reasonable adjustments – section 20

36. The Judgment by EJ Hendry set out, for example at paragraph 65, the issues in relation to potential timebar, and what matters required to be addressed. Some of the amendment is sufficient to address matters.

37. Some of the claims of a failure to make reasonable adjustments under section 20 I do not strike out, nor do I consider that they are appropriate for a deposit

order. I consider that there is, just, sufficient to do so. They are set out at paragraphs 4.1,4.4 4.5, 4.6 and 4.7. Paragraphs 4.2 and 4.3 relate to matters which on the face of it are time-barred, and there is no pleading as to why section 123(2) could be engaged, or why it is just and equitable to allow those claims to proceed. The issues raised at paragraph 4.8 and 4.10 (there is no paragraph 4.9) are based on an alleged reasonable adjustment of having an agenda. The issues set out in paragraph 72 of EJ Hendry's Judgment I do not consider have been adequately answered. I do not consider that such an argument has any reasonable prospects of success and those parts are struck out.

(v) Harassment – section 26

38. There is finally a claim for harassment under section 26. It is referred to in paragraphs 5.0 to 5.16. There were two grounds alleged for strike out, one in relation to time-bar the other in relation to having no reasonable prospects of success.

39. In so far as time-bar is concerned, it appeared to me that the Claimant had not pled matters sufficiently to avoid the conclusion that they were time-barred, in so far as they occurred outwith the three month period prior to commencement of early conciliation and the Claim, for the matters that were alleged to have arisen outwith that period. The acts are discrete, some are long before the dismissal, no claim at the Tribunal was pursued in relation to them at the time, and I do not discern any adequate connection between them that could engage section 123(2). There are no adequate pleadings in respect of the just and equitable extension issue. There is an argument at paragraph 5.14 that Ms Cheyne was an associated person of the Claimant. That is misconceived. Separately however, I have found it difficult to be clear precisely what the harassment on the ground of disability is alleged to be, and I do not consider that fair notice is given to the Respondents on the nature of the case that is made against them. I do not consider that the case as pled in the amendment has reasonable prospects of success, and I strike it out for that reason also.

(vi) Equal pay

40. It appeared to me that the equal pay claim was pled sufficiently, with identification of three potential comparators, and arguments of like work, or work of equal value. The claims arise under Chapter 3 of the 2010 Act. The Respondents may wish to amend their pleadings to challenge those assertions, but it appeared to me that there adequate pleading had been made to allow those claims to proceed. The claim of like work is different in character to that of work of equal value, and I refer further to that below. In each case, however, the Respondents will be aware of what work both the Claimant did, and each of her comparators did, they will have access to contracts, job descriptions and other evidence on that issue, together with evidence as to remuneration for those employees. Against that background I consider that they do have fair notice.

(vii) Conclusion

41. In general, whilst the pleadings are not as clearly focussed as they might be, I take account of the fact that the Claimant is not represented by someone legally qualified, and has (through her father) done her best to provide the information and fair notice required. There is a public interest in having claims of discrimination resolved after evidence, so long as they are sufficiently pled, which includes that they give fair notice to the Respondents, and do not have no reasonable prospects of success. The two issues are connected in respect that without sufficient pleadings a claim is not liable to have reasonable prospects of success.

42. I am not in a position to say whether the allegations that remain made are true in fact or not. Only with evidence can that be done. It appears to me that there is sufficient pled to give the Respondents fair notice of the allegations against them on those issues I have determined should not be struck out.

43. The test for a deposit order is slightly lower than that for a strike out, in that it may be imposed where there are little, as opposed to no, reasonable

prospects of success, but very similar considerations arise. I do not consider that I am able to say that there are little reasonable prospects of success for those matters not struck out. Matters are dependent on evidence on matters of fact that are disputed. It appeared to me, having regard to the case law set out above, that it was not appropriate to exercise my discretion to make a deposit order for those claims (save for that of unfair dismissal on which the argument does not arise) which I have not struck out.

44. Having said that, it is important that I also state that that is not the same as saying that the Claimant has a reasonable chance of success in any of the claims that remain. The basic facts of the case which are not disputed are referred to above. The Respondents, during the course of the hearing before me, stated that if the claims did proceed to hearing and failed, they would then make an application for their expenses. That possibility had been mentioned by EJ Hendry in his earlier Judgment. Their position is that the claim is a straightforward one for unfair dismissal, where the issues to be determined are affected by the admitted fact that the Claimant ingested cannabis, and as a result failed a drugs test. Whilst certain other claims are able to proceed, it is not at this point clear what evidence may be led in relation to them.

45. The Claimant, if her claims fail, may well then face an application for expenses from the Respondents, who can do so regardless of the fact that a deposit order has not been made, and an argument that her claim was pursued unreasonably. If that application is made, and granted, the Claimant may then face a liability in expenses of a sum that may well require taxation as the claim may well exceed the maximum summary assessment of those expenses of £10,000. That is one factor that the Claimant may wish to consider carefully, as the effect on her of an award, if it were to be made, would be extremely serious. It is a matter for her.

46. The Respondents did not seek either strike out or deposit in relation to the claim of unfair dismissal, but that also does not mean that the Claimant is

likely to succeed with the arguments. It is not yet known whether the comparators proposed for the claim of equal pay do in fact carry out like work, or work of equal value, or what the full terms of the Respondents' defence will be.

47. During the hearing I encouraged the Claimant and her representative to give careful consideration to what was being claimed, what the law was in relation to the same, and what facts were to be argued to be relevant to that. I note that EJ Hendry in his own most recent Judgment made comments in the final paragraph in a similar vein.

Employment Judge: **Alexander Kemp**
Date of Judgment: **24 January 2019**
Entered in register: **24 January 2019**
and copied to parties