Case Number: 3400431/2014
3331275/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Hilaire	v	**Luton Borough Council**

PRELIMINARY HEARING

Heard at: **Watford** **On:** **30 January 2019**

Before: **Employment Judge Smail**

Appearances:

For the Claimant: **In person**
For the Respondents: **Mr Caiden, Counsel**

PRELIMINARY HEARING JUDGMENT

1. The claims in 3331275/2018 are struck out as having no reasonable prospects of success.

2. Without undermining the effect of Order 1 above, the reconsidered acceptance date for the claim form of 3331275/2018 is the 3 January 2019.

3. The definitive list of claims and issues that will be determined at the full merits hearings in 3400431/2014 is that contained in the Scott schedule before Employment Judge Sigsworth at the preliminary hearing on the 9 January 2018 (with the one addition made at that hearing), and present in the bundle today at pages 99 to 108, also numbered 147b to 147k.

4. The respondent's application for costs against the claimant is refused.

REASONS

1. This is an application by the respondent to have claim no. 3331275/2018 which was presented on 25 May 2018 struck out as having no reasonable prospects of success.

2. The claimant was employed by the respondent as a youth and community worker between 9 September 1990 and 22 January 2014. He was dismissed ostensibly for redundancy. He has already issued a claim presented on 13 November 2013 during the notice period for his dismissal, the 2013 claim. The case presented on 13 November 2013 was not given a case number until 2014.

3. In the 2018 claim he wishes to claim in respect of a relatively narrow factual scope, as he explained to me in argument, in respect of pension. In the 2013 claim he had sought to argue that the failure to place him in a pension scheme from 1999 onwards was discriminatory as was failure to resolve his difficulties caused by the initial failure. This was Allegation 1 in a Scott Schedule prepared initially on his behalf by his solicitor.

4. At Allegation 27 of the Scott Schedule, in respect of June 2013, the factual contention is that pensions deductions were not made correctly after the claimant complied with a request to opt into the pension scheme. The claimant's salary was stopped without explanation. A request for an explanation had not been addressed satisfactorily. No paperwork was provided. That was the detail of Allegation 27.

5. Insofar as there were discrimination claims, these were struck out or dismissed by Employment Judge Sigsworth on 3 November 2016, a position confirmed by him after a reconsideration on 4 January 2017 when he pointed to time limits. The claimant sought to appeal that determination. The appeal was unsuccessful because the appeal was out of time. As I understand it, the appeal never got off the ground.

6. It is instructive also to refer to the particulars of claim that were prepared by solicitors in respect of the 2013 claim. The original claim as presented on the date of presentation was not fully pleaded. That was corrected in due course and I will quote two headings: 'the pension dispute' and 'new pension'.

Pension Dispute

7. The 'pension dispute' was pleaded as follows. Throughout the claimant's 23 years of continuous employment the claimant had assumed he was part of the respondent's pension scheme. It was well known by employees that all Luton Borough Council workers are entered into the scheme automatically and this was also reiterated in a later re-issued version of his contract in 1999 which states he would have been deemed to have joined unless he had opted out. However, in the early part of 2013 the claimant was shocked to learn that the decision to opt him out of the scheme had been taken without his knowledge or consent at the start of his employment with the respondent.

8. The claimant attempted to discuss this matter with Ms Barbara Chapman from the respondent's payroll department in the early part of 2013. Ms Chapman informed the claimant that the failure to enrol him into the council's pension scheme had been a failing on the part of the respondent. She also told the claimant that this situation could be remedied and that he would be put in the position which he ought to have been but for the failure of the council, ie he

would have a council pension of the value it would have been had he entered the scheme 23 years ago.

9. The respondent is put to proof that the failure to opt the claimant into the correct pension scheme and/or to fail to provide him with any or any adequate information in this matter was not related to the claimant's protected characteristic of race.

10. The failure to opt the claimant into the respondent's pension scheme appears to be a breach of contract. At the start of the claimant's employment he was provided with an original contract of employment dated 9 November 1990. At paragraph 5 under the heading "Pension" it states: "In accordance with the teacher's superannuation consolidation regulations 1998 any youth worker who has a part-time election for superannuation purposes and who works part-time whether in accordance with a part-time contract or an hourly or sessional basis, will have any service automatically counted as reckonable for the purposes of calculating pension entitlement." Implicitly, an employer with the claimant's contract would be entitled to use his service as a contribution to his final pension entitlement.

11. The claimant further alleges that the failure to opt-in the claimant automatically into the respondent's pension scheme is a breach of a term implied by custom, ie it was notorious, certain and reasonable that employees acting as youth workers would be entered into the pension scheme of the respondent automatically unless there is an express request for this not to be the case.

New pension

12. This was pleaded as follows. In July 2013 the claimant complied with Ms Chapman's request to opt-in to the pension scheme. The claimant was expressly told that if he did so, this would enable the council to rectify their error.

13. However, in spite of this, there had been one deduction of contributions only from the claimant's pay amounting to £127.81 in July 2013 before the claimant's pay was stopped altogether.

14. On the claimant's payslip the deduction was described as for a teacher's pension scheme, yet the claimant has not ever received any explanation of what pension scheme he used to be part of or what the value of this will be to him.

15. In fact, the claimant has not received any paperwork relating to his pension at all clarifying either what the contributions are or what the returns will be. There is also no explanation as to how the figure deducted in July had been reached. Since opting into the pension scheme at Ms Chapman's request, there has been no attempt to rectify Luton Borough Council's initial error and the claimant has not been contacted about it. For the reasons stated above there now appears to be a further error of deducting money from the claimant's salary to pay into a pension which may not be one he is entitled to. The claimant is to put the

respondent to proof that the failure to opt the claimant into the correct pension scheme and/or to fail to provide him with any or any adequate information in this matter was not related to the claimant's protected characteristic of race. He asserts, in effect, a prima facie case of race discrimination. The pleading puts it over to the respondent to show that discrimination played no role whatsoever.

16. So, stepping back from there, this was a significant claim to the extent that it appeared that for the vast majority of his employment, the claimant received no pensionable pay, no contributions being made by the employer, no contributions being made by him.

Contemporary documentation

17. There were further procedural aspects of this I will turn to in a moment but before I do I will focus upon the contemporary documentation that was available to the claimant. I have been directed to the claimant's letter of 4 June 2013, page 161 of this bundle. On 4 June 2013 the claimant wrote to the council:

> "Further to my conversation with one of your team members, Barbara Chapman, I was informed that I would need to put into writing to you my request to be part of the pension scheme. I am putting this into writing to you now because I have only just recently been made aware that after more than 22 years of service to my knowledge I have never opted out of the pension scheme, yet Luton Borough Council have never made any contributions toward my pension or made any deductions from my wages towards it. Barbara told me I would need to now formally opt into the pension scheme before this can be investigated. I was also informed that there is no documentation held with yourselves from me that ever stated I wished to opt out of the pension scheme when my employment with yourselves commenced. I have also accessed my personal file in March 2013 and there is no record of this held there either…
>
> Once this has been done could you please let me know when we can meet to discuss the issues surrounding my pension contributions from the commencement of my employment?"

18. The claimant did know that on 26 July 2013 £127.81 was deducted from his pay by way of contribution to the teachers' pension. There was no other pension contribution deducted from his payslip in the history of his employment. I have seen a note which I believe is produced by the claimant dated 10 October 2013 being internal communication within the council to this effect:

> "The SSP was sent on 7 August 2013 and a second copy has now been put in the post today. For the period in question, Julian was paid in November for his normal monthly salary £67.78. He was not paid in December due to payroll receiving an instruction from his manager to stop his pay from 21 November due to being absent from work without permission."

19. He was next paid in January, at the instruction of his manager, via BACS for the following days that were stopped: 22 November 2011 to 29 November 2011 for the amount of £167.41. In the January payroll he was paid two months' salary for December 2011 and January 2012. From 15 November 2012 Mr Hilaire was absent from work due to long term sickness. He went on to half-pay on 23 January 2013 and on nil pay from 24 July 2013. He was put into the teacher's pension scheme in July but backdated to 1 April 2013 at his request. As a result, £127.81 was deducted from his pay. That explains some of the payroll history. Further, once the first deduction had been made and given the pension

deduction errors and given that his sick pay had exhausted, on 6 November 2013 the claimant instructed payroll not to make any further deductions from his wages towards pension contributions and that was repeated on 8 November 2013.

20. So it seems to me that as at the end of 2013, or really from June 2013 onwards, the claimant knew no contributions had been made in respect of a pension. He knew that for the first time pension contributions were being deducted into the teacher's pension scheme and he knew that he had instructed that this should stop because his sick pay was exhausted. I have set out what was said in the original full particulars of claim in respect of pension, save for mentioning what was in the prayer, as it is called, at the end of the pleading where the following remedies were claimed: compensation for unfair dismissal – basic award and compensatory, a declaration that the claimant has been discriminated against on the grounds of his race, compensation for injury to feelings in respect of race, compensation for injury to feelings in respect of disability discrimination, compensation for breach of contract in relation to the claimant's pension, unpaid wages and interest on the same and holiday pay. I should observe in passing that there are a great many other allegations of discrimination. Today I am focusing only on matters in respect of pension.

Withdrawal of contract claim

21. So, there was an express claim of breach of contract in respect of pension. That was withdrawn before Employment Judge Cassel on 15 June 2015. There is a judgment signed 13 July 2015 from Employment Judge Cassel: "Judgment on Preliminary Hearing… The claim of breach of contract is dismissed on withdrawal." Fairly, the respondent has acknowledged that probably that should just record the withdrawal of the breach of contract claim because there were two reasons floated for this withdrawal before me by the respondent's lawyers who were also present on 15 June 2015. The claimant says that he cannot remember the reasons for this withdrawal. This was at a time when he was represented: he no longer is.

22. First that the pension claim, if correct as set out in the original particulars of claim going back to the date of his first appointment, would be likely to be far greater than the £25,000 cap in the employment tribunal and it was mooted and envisaged that it was possible that there would be a High Court or a County Court claim for breach of contract in respect of the entirety of a pension going back to 1990. Now as I understand it, that claim has not yet been brought. I note that the claimant is representing himself. I do not know if that disadvantages him in terms of legal understanding as to what claims might be brought. Certainly, it appears he has been very active in compiling his allegations and as I understand it he has sued his solicitors, Unison, in respect of a matter he tells me is largely personal injury. It is clear to me that there is no extant contractual claim for his pension. He will know the limitation period for breach of contract in the High Court and County Court is six years. I leave it at that.

23. The second potential reason which also makes sense to me was that this claim had been brought during the notice period before termination and it may be that

the contract jurisdiction in the employment tribunal can only be invoked once the termination has come into effect because the contract claims that may be brought either arise or are in existence at the date of termination. I merely mention that in passing as a possible explanation. The most likely explanation seems to me the £25,000 cap. Perhaps the two explanations work hand in hand, and fairly before me Mr Caiden, on behalf of the respondent, does not seek to argue that there has been res judicata of the contract claim. The contract claim was withdrawn so that it could be pursued elsewhere if necessary. That is the understanding we have arrived at in submissions today.

24. So as a contract claim the pension was withdrawn on 15 June 2015 and the two pension-related allegations that were put into the Scott Schedule of allegations were dismissed, or struck out by Employment Judge Sigsworth on 3 November 2016, as confirmed on 4 January 2017. There is a note that this is time limits related. That would apply certainly in respect of the first allegation in the schedule if there was a failure to put him into the pension either in 1990 or 1999, that failure found EJ Sigsworth was to be taken as happening at the time it was first made and the three month period of limitation ran from than onwards. That was his judgment. It has not been set aside successfully on appeal and it seems to me we are bound by that. I note that in his own version of the Scott Schedule, which I will examine shortly, the claimant does not repeat the pension related discrimination claims. Instead he tells me he seeks to bring this new claim. He does so, he tells me, on the strength of a letter he received on 26 February 2018.

26 February 2018 letter

25. That letter is from HR business support of the council, from Andrew Williams, HR business manager and reads as follows:

> "Dear Mr Hilaire
>
> Further to your employment tribunal case with Luton Borough Council our legal department has requested you be provided with pension information/contact details concerning your pension deductions made in 2013. On investigation I can confirm pension deductions to the amount of £127.81 were made in your July payroll for the teacher pension fund which was to cover retrospective deductions from 1 April to 31 July 2013. These payments were put on hold after your subsequent request not to pay into the pension fund. These deductions were not forwarded to the teacher pension fund and should have been paid back to you when you requested termination of your payments to the fund and certainly when you left Luton Borough Council's employment. My apologies for this error and we will refund the deductions to you immediately. Please provide your bank details."

26. Now the claimant says that this is new information. With respect I do not think it is. He knew all of those matters back in 2013. He knew that he had had no pension contributions made until 2013 when they were backdated to 1 April. That was on his payslip. In June 2013 he challenged the respondent then in terms of the letter I have referred to above. He knew that was all that had been taken from him in respect of pension. He seeks in 2018 by a claim form presented on 28 May 2018 to claim as follows, again I take it from the prayer: pension contributions that the respondent should have paid plus interest on the same. That is pension contributions he clarified in argument before me on the

pension from 1 April 2013 only. Secondly, full compensation on the pension's potential worth and interest on the same and thirdly, compensation for discrimination and injury to feelings. He explained to me in argument and is apparent also from the narrative in the claim form, that this is limited to the "new pension" as he describes it from 1 April 2013. In the scale of things this is a very modest claim in respect of a very narrow period of factual history but I am entirely satisfied that in 2013 the claimant was able to make this very claim and in large part did so. If he did not I am persuaded by the respondent that he could have and should have under the principles of Henderson v Henderson. As I say, I reject the suggestion that there is anything materially new in the letter of 26 February 2018 which he would not or could not have known in 2013.

27. My conclusion is that all of this might have been claimed insofar as it is discrimination or breach of contract in 2013 and it is an abuse of process to seek to re-claim it in 2018 and one gets there through a variety of ways. First of all, insofar as it was not claimed, it ought to have and could have been under the principles of Henderson v Henderson. Secondly, insofar as it was a contract claim, that contract claim had been withdrawn before Employment Judge Cassel and brought back before the employment tribunal in 2018. It inevitably falls foul of the employment tribunal's time limits which is of course three months unless reasonably practicable for a deductions or contract claim. Well, it was reasonably practicable to bring the claim in 2013 so inevitably it would be out of time in 2018. As I say, that does not stop him suing for the entirety of his pension entitlements in the High Court or the County Court subject to the six-year period of limitation.

28. Further, insofar as the claims are discrimination claims they might have been made in 2013 so Henderson v Henderson applies if they were not made and insofar as they were made, they were struck out or dismissed by Employment Judge Sigsworth at the end of 2016/beginning of 2017 and to re-present them now would be an abuse of process, and inevitably fail under time limits rules, it not being just and equitable to extend time. He had all the information in 2013 to bring these claims. He chose to withdraw pension claims, so as to be at liberty to bring them as breach of contract claims in the civil courts.

29. So for those reasons I conclude that these claims have no realistic prospects of success. Further, in the alternative, the respondent does make the point that there is no ACAS Certificate in respect of this claim and they invite me in effect to reconsider the acceptance of the claim form and reject it. I have unfortunately no discretion about that. As I understand it, there ought to have been an ACAS Certificate covering this claim, there is not so in the alternative and very much in the alternative I reconsider the acceptance of the claim form and reject the claim form, but that is not the fundamental problem with this claim. The fundamental problem with this claim is that it either was or ought to have been brought in 2013.

30. The Tribunal has power to strike out all or part of a claim under Rule 37 of the Tribunal rules if is has no reasonable prospects of success. The rule in Henderson v Henderson (1843) can be stated as precluding a party from raising in subsequent proceedings matters which were not, but could and should have been raised, in earlier ones.

ACAS Certificate 2019

31. Since conclusion of the argument the claimant has in fact provided me with an ACAS Certificate dated 3 January 2019. Therefore, I accept the claim form in 3331275/2018 as from 3 January 2019. That does not alter in any way my judgment on the earlier matters concerning breach of contract and discrimination.

The Scott Schedule

32. Turning now to the matter of the issues that will be litigated before the Employment Tribunal over 10 days in June. It is a notorious feature of discrimination cases that it is essential to have the issues clear so that evidence can be prepared so that submissions and cross-examination can be made and so that the tribunal can come to a fair judgment between the parties. In this case, as is so many other discrimination cases, there has been a decision to refine the allegations into a Scott Schedule so that they can be followed by the parties. The Scott Schedule operates as a road map for a case and the Scott Schedule that appears in my present bundle at pages 99-108 is the schedule which reflects the original schedule prepared by the claimant's solicitor, Mr Jackson and the developments to it reflecting the developments in the proceedings. The claimant has suggested that that schedule is the respondent's schedule. That is not entirely accurate as I see it. Mr Jackson, a solicitor, provided the first version of this schedule on 15 June 2015 in front of Judge Cassel.

33. Judge Sigsworth then took over the case management of matters, and had to rule on applications as proceedings went along, and indeed ruled upon amendments that the claimant made. There is a reference to this schedule on 25 January 2018, that was when the document was set out reflecting a case management hearing on 9 January 2018. At 2.2 of Orders, Judge Sigsworth says the claimant agreed with the employment judge that it was important now to stick to the issues identified today. Essentially those in the Scott Schedule plus one other to be added so that the case could move to a merits hearing as soon as possible. The employment judge reminded the parties of the overriding objective and the requirements of proportionality, saving of cost and time, etc. Judge Cassel had refused allegations of harassment on 26 June 2015. He wrote this in respect of harassment.

> 'There was an application substantially to bring new claims but I was told that the dates, already the subject of these proceedings in direct discrimination, would be the dates of harassment. The conclusion I have reached bearing all those matters in mind that I have to in Selkent is that this effectively is a new cause of action brought very late on in these proceedings. It is substantially out of time and it would not be just and equitable to extend time. Effectively the application is based on the quality of advice that the claimant previously received and I refuse it'.

He rejected harassment amendments. Amending the claims to include disability he dealt with at 8.3. He noted disability was in dispute -

> 'but it is now accepted by the respondent that at the time of the dismissal the claimant was a disabled person. That was the extent of the admission and bearing in mind time limits and other matters referred to in Selkent, amending the claims as I have been asked to they will be

substantially out of time and I must consider extending time as part of the balance and exercise. The conclusion I reach is that it will cause considerable difficulty to the respondent who would need to obtain relevant evidence which might become extremely difficult after such a lapse of time. To do so would cause hardship and injustice to the respondent. I therefore refuse the application to amend the claim.'

34. He also dealt with victimisation on 15 June 2015. Employment Judge Cassel noted that the Claimant's previous solicitors on 6 June 2014 wrote to the tribunal, and copied to the respondent an email. The email was in unequivocal terms as follows.

"The claimant writes to withdraw his claims of victimisation and his claim of wrongful dismissal. The conclusion I have reached given all the circumstances in various matters I have to consider in Selkent is in effect that this application is an attempt to resurrect those claims which have been withdrawn and dismissed. There is a balancing exercise and I conclude there would be considerable injustice to the respondent if this application were accepted and I refuse it'.

35. So, that is an example of amendments being refused. The schedule is prepared by Mr Jackson. That is the starting point. It refers back to the original claim form, it is not simply a schedule of amendments, it is an attempt to actually reflect the claims in the claim form. Amendments where they are permitted are made to it and referring back to the preliminary hearing before Employment Judge Sigsworth on the 9 January 2018 he says this at paragraph 2:

"There was some debate about the Scott schedule, and the claimant raised further queries in relation to it. There was substantial discussion, but at the end of this it was accepted by the parties, save in respect of one matter which will be added to the Scott schedule, that the current schedule contains the issues that will be determined by the Tribunal at the merits hearing. A complaint of direct disability discrimination at paragraph 52 of the amended Particulars of Claim will be added. For the avoidance of doubt, the schedule will incorporate the amendments allowed by the Employment Judge on 14 April 2014 and thereafter at the preliminary hearing on 3 November 2016. The respondent's solicitor will draft a final and definitive schedule."

36. So, what has happened is the respondent has been given the task of updating the claimant's schedule prepared by Mr Jackson as the procedural events happened. It is not the respondent's schedule, it is the claimant's schedule updated by the respondent to reflect procedural developments. I have been shown some general comments of Her Honour Judge Simler at an appeal in which she expresses the hope that there can be agreement as to the schedule and makes some obiter comments about not excluding the possibility of using the claimant's schedule. Employment Judge Laidler made reference to those comments and said that the trial Judge would have to also consider matters on day one of the hearing.

37. I am told, and I accept, that the parties have exchanged witness statements in 2015 based upon Mr Jackson's original schedule; that makes sense to me. The schedule that the claimant puts before me today is a 2018 document as I understand it. It is in a significantly different order in terms of the dates of allegations from that in Mr Jackson's original schedule and it seeks in effect to ignore rulings of Judge Cassell and Judge Sigsworth as to what goes in by way of amendment. That is not an acceptable way of preparing for the hearing. As I say it is notoriously difficult to keep discrimination claims under control,

frequently. That is why there are so many preliminary hearings. This case has had an unusually high number of preliminary hearing, but at all times those preliminary hearings are designed to refine matters to reflect accurately the original claim form and to reflect those amendments that are permitted. It would be wholly unsatisfactory to start the case with a different schedule from that which has been developed in the preliminary hearings to date.

38. I rule that the schedule that will used at the full merits hearing is the schedule originally prepared by the claimant's solicitor and subsequently refined being pages 99 to 108 of this bundle prepared for today's hearing. Were anything other than the position there would be complete chaos at the full merits hearing.

39. Expressing dissatisfaction with this ruling, the claimant has referred me to a letter from Cambridge Legal Practice which is wrongly dated the 5 June 2014, it should be dated the 5 June 2015. He says that this letter shows that Mr Jackson's schedule was for amendments only. In fact, it shows the opposite. Mr Jackson writes as follows to the Tribunal:

> "A preliminary meeting is scheduled for the 15 June 2015 to discuss amendments to this claim. The claimant's original solicitor submitted a letter to the Tribunal on the 11 July 2014 accompanied by a list of issues setting out proposed amendments. Since that time at the respondent's insistence the claimant has incurred considerable cost while employed due to disability in instructing with the respondent two medical experts. In the opinion of the claimant neither expert needed to be instructed and predictably both have confirmed that the claimant is and was at the relevant time suffering from the respective disabilities of clinical depression and arthritis. Now it is beyond doubt that the claimant is disabled within the definition of Section 6 of the Equality Act 2010 the original proposed amendment referred to above is superseded. In any case, we reviewed the claimant's previous solicitors work and concluded it did not sufficiently particularise the claims. We have sought to clarify these issues with the attached Scott schedule which addresses all the discrimination claims."

So with respect to the claimant, that indicates quite the opposite of what he is submitting to me and supports wholly what has been my understanding, namely that Mr Jackson purported to prepare a schedule for all of the claimant's claims.

Costs

40. I do not exercise my discretion to award costs against the claimant in the matter. There is one aspect of the claim which is fundamentally troubling and that is that the claimant got no pension at all, aside from a negligible amount in June 2013. I cannot but suspect there might be, although it is not presently before any court, some merit in some contract claim somewhere about that. That is a matter for the Claimant to consider, however.

41. We have, further, made some progress today in that at least the issues for the final hearing have now been ruled upon. Much of the criticism made by the respondent is fair. The response to their costs warning letter does read as though it is seeking to extract a settlement. Be that as it may, I have little doubt that the claimant has no means at all to pay a costs order. I am not entirely convinced that £600 is his only monthly income but it is not shown otherwise. But I do not exercise my discretion to award costs. Further, if costs are going to

be pursued there ought to be, as with the County Court, exchange of a schedule of costs in advance and it is unattractive to make an application essentially on the hoof as it has been.

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Employment Judge Smail

28.02.19

Sent to the parties on:

…06.03.19……..

For the Tribunal:

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