EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4121906/2018

Preliminary Hearing Held at Aberdeen on 15 April 2019

Employment Judge: Mr A Kemp (sitting alone)

Mr B Cochrane	**Claimant** **In person**
Meallmore Limited	**Respondents** **Represented by:** **Mr R Bradley** **Advocate**

JUDGMENT

1. **The Respondents' application for strike out under Rule 37 in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is granted in respect of the claim of discrimination arising out of disability under section 15 of the Equality Act 2010 and in respect of reasonable adjustments under sections 20 and 21 of the said Act, of consent of the Claimant.**

2. **The claims under sections 14 and 22 of the said Act are struck out by the Tribunal, of consent of the Claimant, under the said Rule.**

3. The Claimant's application for a strike out of the Response under Rule 37 of the said Rules is refused.

4. The Claimant's application for a deposit order against the Respondents under Rule 39 of the said Rules is refused.

REASONS

Introduction

1. This Preliminary Hearing was arranged to consider the Respondents' application for strike out, which failing for a deposit order, the Claimant's applications to the same effect, and for case management in relation to joint instructions to the Claimant's General Practitioner.

2. The Respondents' application was made on 5 March 2019, and sought strike out of the claims for discrimination arising out of disability, indirect discrimination in respect of disability, and reasonable adjustments. Mr Bradley who appeared for the Respondents, confirmed that his application was not sought in relation to claims of direct discrimination on the ground of disability under section 13 of the Act, indirect discrimination on the ground of sex under section 19 of the Act, or dismissal in respect of the making of a protected disclosure under section 103A of the Employment Rights Act 1996. Those claims shall therefore proceed.

3. Mr Cochrane, who appeared for himself, stated at the outset that he did not oppose the dismissal of his claims for discrimination arising out of a disability, nor that related to reasonable adjustments. He indicated that he had not made any claim for indirect discrimination on the basis of disability. In light of the concessions he made, I have struck out the claims under sections 15, 20 and 21 of the Equality Act 2010. I have not struck out the claim under section

19 for indirect discrimination as that claim remains, and is pursued solely on the ground of sex. There did not appear to me to be any claim of indirect discrimination made on the basis of disability, and nothing to strike out, but I record here the absence of such a claim of indirect discrimination on the ground of disability being made.

4. The Claimant had also referred under the heading of direct discrimination to sections 14 and 22 of the 2010 Act. The former is not in force, and the latter permits regulations to be made. Neither can found the basis for a claim, in my opinion and as I pointed out to the Claimant. He agreed to those claims being struck out as recorded above.

5. The remaining matters to be dealt with were the Claimant's application for strike out or deposit, made on 6 March 2019, and a measure of case management. I dealt with both issues below.

6. The parties had prepared a joint bundle of documents, and the Respondents produced a list of authorities and skeleton arguments both for their application, and to oppose that of the Claimant. The Claimant produced one authority.

Claimant's application for strike out – Submissions

7. The following is a summary of the submission made by the parties.

8. Mr Cochrane referred to Rule 37 in making his submission. He noted that the Response Form indicated that the Claimant had been dismissed for making inappropriate comments, that that had been discussed at the Preliminary Hearing and that the Respondents had been asked to elaborate, and that they had done so, set out at page 48 of the joint bundle.

9. He argued that there had been nothing wrong in what he had done. He had had a conversation with someone, as a new member of staff, and had not

made any inappropriate comments. Logic indicated that he had not acted inappropriately, he said. Even if that were not the case, common sense indicated that matters would go through the disciplinary procedure. He argued that the comments made by the Respondents which are at page 48 of the joint bundle had been vexatious and scandalous, and he indicated that they had caused problems in his home life. He argued that the Response had no reasonable prospects of success, as "someone does not get sacked summarily for chatting to a colleague". He referred to the case of ***Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13/LA***, although he accepted that that stated that in a fact sensitive case strike out would rarely be granted. But here the Response was so weak it should be struck out.

10. For the Respondents Mr Bradley argued that the Claimant had the onus of proof as he had less than two years' service, in fact he had only worked for two shifts over a week. He referred to ***Ross v Eddie Stobart Ltd UKEAT/0068/13/RN***. The meaning of scandalous was explained in ***Bennett v Southwark London Borough Council [2002] ICR 881*** at paragraph 27, in which there was reference to the misuse of the privilege of legal process in order to vilify others or giving gratuitous insult to the court in the course of a process, and the term "vexatious" in the case of ***Attorney General v Barker 2000 1 FLR 759*** at paragraph 19 in which there was reference to little or no discernible basis in law for a claim, an effect on the other party out of all proportion to any gain and which involves an abuse of the court [or tribunal] process.

11. The law with regard to no reasonable prospect of success had been summarised in ***Silape v Cambridge University Hospitals NHS Foundation Trust UKEAT 0285/16***, which in turn referred to ***Tayside Public Transport Co Ltd v Reilly [2012] IRLR 755***. The essential facts of the present claim were in dispute. The Claimant had not added orally to his written argument. He had stated four times that the Response Form "cannot be altered", but that was not so, particularly where requested by the Employment Judge at a

Preliminary Hearing as had occurred here. Here the reason for dismissal was what the Respondents offered to prove, and if successful meant that the Claim failed. Reference was made to ***Abernethy v Mott, Hay and Anderson [1974] CR 323*** on what a reason for dismissal is. The Tribunal could not be satisfied that the test in Rule 37 was met.

12. He argued that there was a different test for a deposit order, being little reasonable prospects rather than no reasonable prospects, but that was not met either.

13. The Claimant was invited to comment further and stated simply that logic would say that one would not be dismissed for chatting to a colleague and there would be something else as the reason.

The Law

14. 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 at Rule 2 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."

15. 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……."

16. 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….."

17. 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).

18. The meaning of the words “scandalous” and “vexatious” is referred to in the two cases founded on in the submission of the Respondents as set out above.

19. The more frequently-encountered basis for strike out being sought is the third limb of the test, being that there are “no reasonable prospects of success.” That has been the subject of judicial comment in a number of cases.

20. 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."

21. 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."

22. 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."

23. 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.

24. 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 competent to strike out a Response such as the present, and becomes an exercise of discretion.

25. 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."

26. 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:

> "[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

27. In my judgment, the test set out in Rule 37 is not met by the Claimant. I accepted the submission made by Mr Bradley. It appeared to me that the submission for the Claimant was based on a lack of proper understanding of what the law requires in such circumstances, which is understandable given that the Claimant is representing himself.

28. Firstly, I consider that the argument that the additional specification provided by the Respondents could not be made, on the basis that the Response Form could not be altered, was wrong. A Response Form, as a Claim Form, can be altered, either by providing further and better particulars or by formal amendment. Such changes happen very regularly in cases before the Tribunal. Had it been incompetent, the Employment Judge would not have sought the clarification of the phrase "inappropriate comments".

29. Secondly, I consider that Mr Bradley was right that the test for what was "scandalous" or "vexatious" was not met, for the reasons he gave and on the basis of the authorities he cited. The words each have a particular legal meaning explained in the paragraphs he made reference to, set out briefly above, and they are not apt to apply to the circumstances of the present case.

30. Thirdly, whilst the Claimant may dispute the facts of what was said and in what context, that does establish that there is a factual dispute that requires to be determined by evidence. It is not the case that the only possible conclusion from what has been pled must be that the reason for dismissal was unlawful, as the Claimant contends. The case law to which I have referred above is given in the context of arguments made by Respondents against the claims made by Claimants, but I consider that the same considerations arise in respect of the response to a claim of disability discrimination or, as it is generally called, whistle-blowing as made in the present case.

31. The Respondents have set out their position in the Response Form and with the further particulars following the Preliminary Hearing, and if it is established in evidence that the reason for dismissal was as they allege that may well result in the Claim failing, as it may negate the argument for the Claimant that the reason is either not the actual reason which he argues was an unlawful one. But that is a dispute that I do not consider I can assess purely from the pleadings, and it appears to me that the decision should be taken after hearing the evidence on those disputed facts. The Claimant can both seek to test the Respondents' evidence in cross examination, and make reference to it on the basis of what he argues is the logical conclusion, or a common sense view of it, in his submissions. The Respondents can lead their evidence and seek to defend against the attacks made. I cannot at this stage know which side may prevail. The onus does however at least initially fall on the Claimant as was emphasised in the **Ross** case cited by the Respondents.

32. The test for strike out is a reasonably high one. That is set out in the case law, where it is made clear that strike out must be considered also on the basis of its proportionality, and that it is an exceptional case, where discrimination issues arise, where it will be granted. That is a principle referred to in the ***Abertawe*** case to which the Claimant referred, but also many others as set out in the analysis of the law, above.

33. I consider that the test for a strike out of the Response on the basis that it has not been established that there are no reasonable prospects of success for the Respondents, and as the proportionality test for a strike out is not met.

34. The application included an alternative for a deposit order under Rule 39. It was not spoken to in oral argument by the Claimant, but I consider that the test for that, lower though it is, has also not been met. It appears to me that the issue is one of fact, and it is not a matter of logic or common sense that the Claimant is so likely to succeed, as the Claimant argued, that the Response can be said to have little reasonable prospects of success. The issue depends on the assessment of the evidence, including whether or not the onus of proof shifts to the Respondents, and what inferences may be drawn from the evidence that is given. Whilst he can argue that the reason given is not credible, the Tribunal may or may not agree with that. Whilst he can argue that there should have been a disciplinary procedure, he does not have the service to claim unfair dismissal and the failure to follow any process may or may not be explained in evidence. Other arguments may be made by each of the parties, but I consider that it cannot be said that the Respondents have little reasonable prospects of success in defending the Claims made.

35. I was therefore satisfied that neither of the Claimant's applications met the tests set out above, and I refused them.

Case Management

36. The parties had earlier disagreed about joint instructions to the GP but informed me that agreement on that issue had recently been reached, and a mandate to provide the instructions signed that morning. The parties may wish to consider what further procedure is appropriate after having received the written report that is now being obtained. In light of that, it appears to me that it is appropriate to give parties an opportunity both to obtain and to consider that report before deciding on further procedure, and the parties are

directed to email the Tribunal once that report has been obtained after a period of two weeks for consideration of it.

37. The parties should discuss, on receipt of the report, in accordance with the overriding objective, what further procedure is then appropriate, in particular whether that should be by way of Final Hearing or not. If they are agreed as to that, they should each email the Tribunal to confirm that, and the procedure they suggest. The Tribunal will then consider the proposed course of action.

38. In the event that the parties have not confirmed receipt of the report and an agreement within 6 weeks of the date of this Judgment, the Tribunal will arrange a further Preliminary Hearing to address case management.

Employment Judge: **Alexander Kemp**
Date of Judgment: **18 April 2019**
Entered in register: **24 April 2019**
and copied to parties