EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108280/2019

Preliminary Hearing Held in Aberdeen on 28 February 2020

Employment Judge A Kemp

Miss L Hurley	**Claimant** **In person**
Gateway Highland Homeless Trust	**Respondent** **Represented by** **Mr E Smith** **Solicitor**

JUDGMENT

1. **The claim for "other payments" made in the Claim Form is struck out under Rule 37.**

2. **The application under Rule 37 to strike out the claims for detriment and dismissal for having made protected disclosures is refused.**

3. **The application for a deposit order under Rule 39 is refused.**

REASONS

Introduction

1. This Preliminary Hearing was arranged to address applications for strike out which failing deposit order. The respondent made the same by email dated 6 January 2020.

2. There have been two Preliminary Hearings held prior to the hearing before me. The claimant pursues three claims (i) detriment for having made protected disclosures (ii) dismissal for the same reason and (iii) for "other payments", clarified before me as an alleged unlawful deduction from wages.

Claim regarding other payments

3. During submissions the position in respect of the third claim was clarified. The claimant had been off sick from 29 November 2018 until her dismissal on 6 March 2019. Early Conciliation commenced on 31 May 2019. The claim for unlawful deduction from wages arises under Part II of the Employment Rights Act 1996 ("the Act"). It must be commenced within three months of the deduction, or within three months of the end of any series of deductions, unless it was not reasonably practicable to have commenced the Claim timeously (section 23). The last possible date for a deduction, which was understood to relate to issues of overtime or being on call, was on 29 November 2018. That then required Early Conciliation to have commenced by 28 February 2019. It was not, and was over three months late. The claimant explained that that was because she was not fully aware of the requirements, but I did not consider that to be sufficient, as there is a need to make reasonable enquiry. In addition, as Mr Smith had pointed out, the claimant had not provided any pleadings on what the other payments were for, nor why.

4. Against that background it appeared to me that there were no reasonable prospects of success for the "other payments" claim, that it would be outside the jurisdiction of the Tribunal as it was commenced too late, and

it was not in my opinion possible to say that it was not reasonably practicable to have presented the Claim within the primary time limit, and that it had in any event not been pleaded sufficiently such as to be clearly before the Tribunal, as the claimant had simply ticked the other payments box on her Claim Form without providing an explanation in the pleadings as to why. I have struck it out under Rule 37 (which is set out below). The claimant did not seriously oppose that, and although it was canvassed in submissions I have dealt with it separately for that reason.

5. In light of the conclusions I have reached, I have kept this Note as briefly expressed as I consider appropriate, whilst also informing the parties of the reasons for my decision.

Submissions

6. The following is a basic summary of the submissions made by each party. Mr Smith set out the claims made, and referred to the Claim Form and Further and Better Particulars. The basis of the claimant's alleged protected disclosures were lack of on call cover, but emails and other documents proved conclusively both that there was cover, and that the claimant was aware of that. There was nothing improper in the arrangements or the invoicing for those arrangements, and NHS Highland had been aware of the detail. He appreciated that there was a high test for strike out, and he referred to the case of ***Mechkarov v Citi Bank NA [2016] ICR 1121***. He also referred to the cases referred to below, ***Anyanwu, Ezias*** and ***Tayside.*** If the Tribunal did not accept that primary submission, his secondary submission was for deposit order.

7. The claimant explained what her disclosures were, to whom, and why they were said to be protected. She explained that they related to an adult for whom a Guardianship Order had been in place. She, the claimant, had believed that when care arrangements were changed the invoicing to NHS Highland had been fraudulent as it included for care not provided, that there were occasions when the individual did not have someone available for her car, particularly when she was with her mother which happened over much of a weekend about once every three weeks, that the guardians

were not aware of the changed details, and that what was in place was not appropriate for a vulnerable adult with learning difficulties. She explained that the disclosure for financial irregularities was that she believed that the respondent charged 87 hours but paid staff for 70. She said that when she made the disclosures to a member of the respondent's management she was treated differently, subject to detriments, and when off sick was dismissed for a reason that was not the true, or principal reason, that being her having made protected disclosures.

8. She argued that the test was not met, in effect, and in respect of her circumstances stated that she was a part-time waitress earning between £125 and £150 per week net, with no savings or other assets. She had a three year old son.

Law

9. 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—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (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."

10. 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 is scandalous or vexatious or has no reasonable prospect of success

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious

(c) for non-compliance with any of these Rules or with an order of the Tribunal,……."

11. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and 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).

12. 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."

13. 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."

14. 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.”

15. 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.

16. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

> "Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian ***(Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (***ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51***, Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (***ED & F Man … ; Ezsias …).*** But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (***Ezsias*** … Maurice Kay LJ, at para 29)."

17. 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.

18. 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."

19. Rule 39 provides as follows:

"**39 Deposit orders**

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 has considered the issue of deposit orders in ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14,*** and ***Tree v South East Coastal Services Ambulance NHS Trust UKEAT/0043/17***. In the latter case 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

(i) Strike out

21. The test for strike out is a high one, as Mr Smith very properly accepted. The law was summarised in ***Mechkarov***, with comments on discrimination law which I consider are equally apt for a protected disclosure claim, as follows

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal

should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

22. The respondent was in effect seeking conclusively to disprove the claimant's case with undisputed contemporaneous documents, but I do not consider that the high test described there of being totally and inexplicably inconsistent is met.

23. The claimant does have the onus of proof and whether or not the claim succeeds depends on the findings as to what disclosures if any were made, and crucially whether or not they were protected. That in turn depends on whether or not the claimant had a belief in the issues she raised, including whether that was in the public interest, but also whether that belief was reasonable. The question is not for example whether the arrangements for on call cover for the individual did or did not exist, or were or were not adequate, but whether the claimant held a belief in relation to them on one of the specified grounds under section 43B of the Act, and whether that was reasonable. There is then a separate issue as to causation, both for detriment and dismissal. That involves drawing inferences from primary facts.

24. The documents founded on before me do not exclude the possibility, in the sense set out in Rules 37 or 39, of the claimant's case succeeding either on the issue of protected disclosures or causation. For example, the respondent placed great store on an email from Harriet Tay which was copied to the claimant. It concerned support being provided to a vulnerable adult, which had been 24 hours per day but was being changed. There were periods where the person was not supported, during which (the email stated) the person would call the on-call manager. That would be placed on a rota chalk board at the person's address. That email certainly is a basis for cross-examination, but in my opinion does not of itself establish to the standard required for strike out that the claimant's argument is not a stateable one as that is more fully set out above. In any event it was not consistent with a document produced by the claimant which she stated was issued by the respondent. There is accordingly a dispute on the facts

of what arrangements did or did not exist in relation to the person concerned, but also whether they were, or were not, safe for her.

25. The competing arguments made by the parties in this case are not ones that I consider can be properly determined to the standard of no, or little, reasonable prospects of success, on the basis purely of pleadings, documents and submissions at a Preliminary Hearing because there is a body of core disputed fact on matters that may be material to the claims made.

26. That is not the same as saying that the claims do have reasonable prospects of success, still less that they will be likely to succeed, just that it is necessary to hear the evidence to determine which of the arguments made is to be accepted.

27. I understand entirely why the respondent sought to have the orders made. The arguments for them were made forcibly by Mr Smith, who argued when questioned by me that this was as clear a case as the authorities in effect require. From the point of view of the respondent the basis of the claim is misconceived, or contradicted by clear written evidence. The argument for strike out not clearing the high hurdles of the Rules referred to does not mean anything in relation to the final determination of the case. He raised issues before me which are matters that the respondent will be able to raise with the claimant in cross examination.

28. She must prove essentially that she made what were in law disclosures, that they were protected, and that her doing so caused the detriment and dismissal. That includes establishing that the belief she had was a reasonable one, including that it was in the public interest. Any factual inaccuracy around a belief is not irrelevant, as it can influence the reasonableness of the belief said to have been held. But a factual inaccuracy does not necessarily lead to the conclusion that a disclosure is not protected, it is dependent on whether a belief was held, and whether that was reasonably held, for example. A belief that is not in fact correct can nevertheless be reasonably held. That is a matter that again is dependent on fact, and the core facts for that issue are disputed.

29. It is also for the claimant to prove causation, that the protected disclosure caused to a sufficient extent the decisions on detriment and dismissal. I consider, having read the pleadings, that there is a case pleaded that, if established in evidence, might lead to a Tribunal making such findings.

30. In light of that, I did not consider that the respondent had met the high threshold, set out in the authorities, to strike out the claim and that application was dismissed.

(ii) Deposit order

31. I then considered whether there ought to be a deposit ordered. The test for that is a lower one, and the considerations for it are therefore not the same, all as set out above. I have concluded that in all the circumstances it would not be appropriate to order the claimant to make a deposit. I gave the issue considerable thought, and read fully the pleadings for the claimant after the hearing itself. The respondent had concentrated its arguments on the issue of there being on call arrangements for the person concerned, and that the claimant's case was predicated on that. It is certainly an issue in dispute, but it is not the only matter that the claimant puts in issue. In paragraph 8 of her Claim, she referred to a disclosure made to her line manager on 16 August 2018 that "expressed grave concerns for the client's health and safety with no support staff at family contact weekends". That was an issue not just about the charging for care not provided, but also the safety of the arrangements made for a vulnerable adult.

32. Had the only matter raised been a financial one, such that the concern was purely that the respondent was charging more than it ought to have done, I would have been concerned that that alone, given the level involved and the surrounding detail, may not be reasonably regarded as being a matter of public interest. Including within the alleged disclosure a matter of the safety of arrangements in place, which has I consider been pled, makes the argument as to reasonableness of belief in public interest

one that, at the least, might succeed. As set out above, I consider that sufficient is pled on the issue of causation.

33. In light of that, I have concluded that it is not the case that there are little reasonable prospects of success under the terms of the Rule. I have therefore refused the application under Rule 39.

Conclusion

34. I have refused the application for strike out and a deposit order.

35. As I explained to the claimant at the hearing, my not striking out the claim or making a deposit order should not be taken as indicative of there being no risk on expenses. The respondent has issued her with a letter with a warning on that. The rules as to expenses have been referred to in the Note following the earlier Preliminary Hearing. These are matters that she may wish to consider, and take further independent legal advice on. She explained that she had been in contact with solicitors.

36. The case shall now proceed to a Preliminary Hearing on case management. That will determine

(i) How long a hearing may take, how many witnesses are to be called, and when the hearing should be fixed for.
(ii) Whether any orders for witnesses, documents or otherwise are required.
(iii) When documents from each party should be exchanged, and the date for compiling a single Bundle.
(iv) A Schedule of Loss from the claimant setting out the remedy or remedies she seeks.
(v) Whether the parties are interested in Judicial Mediation.
(vi) Any other issue that to the parties or the Judge hearing the matter considers appropriate.

37. Parties should inform the Tribunal by email as soon as possible which dates in March or April 2020 are not suitable for them for that Preliminary

Hearing, which may take about an hour to hold. Parties may apply in that email to have it heard by telephone if they wish. That further Preliminary Hearing should be fixed as soon as possible, and once the date is identified Notice of the same shall be provided separately.

Employment Judge:	**Alexander Kemp**
Date of Judgment:	**10 March 2020**
Date sent to parties:	**11 March 2020**