EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106994/2019 & 4114955/2019

Held in Glasgow on 2 March 2020

Employment Judge F Eccles

Miss Z Stevenson	**Claimant** **Represented by:** **Mr J Meechan - Solicitor**
The Scottish Police Authority	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is (i) to refuse the application for strike out of the claims under Section 47B of the Employment Rights Act 1996 in terms of Rule 37 1(e) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013; (ii) to refuse the application for strike out of the claims under of Section 47B of Employment Rights Act 1996 on the grounds that it is *res judicata* & (iii) to refuse the application for strike out of the claim under Section 27 of the Equality Act 2010 in terms of rule 37(1)(e) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

BACKGROUND

1. Case number 4106994/2019 ("the first claim") was presented on 17 May 2019. Case number 4114955/2019 ("the second claim") was presented on 24 December 2019. The claims contain a number of different complaints under the Employment Rights Act 1996 ("ERA) and the Equality Act 2010 ("EA"). For the purposes of this hearing, the claimant complains of detrimental

treatment for making a protected disclosure under section 47B of ERA and of victimisation in terms of Section 27 of EA. All claims are resisted.

2. The first claim was listed to consider the following preliminary issues:

   (i) Whether the claim in terms of Section 47B of ERA should be struck out in terms of rule 37 1(e) of the Rules of Procedure 2013 because it is no longer possible to have a fair hearing in respect of that part of the claim;

   (ii) Whether the claim in terms of Section 47B of ERA should be struck out on the grounds that it is res judicata; &

   (iii) Whether the claim in terms of Section 27 of EA should be struck out in terms of rule 37(1)(e) of the Rules of Procedure 2013 because it is no longer possible to have a fair hearing in respect of that part of the claim.

3. The claims were combined in terms of an Order dated 31 January 2020. It was agreed that the Tribunal should consider the above preliminary issues in relation to both claims.

4. At today's preliminary hearing, the claimant was represented by Mr J Meechan, Solicitor. The respondent was represented by Dr A Gibson, Solicitor. The Tribunal was provided with a bundle of productions.

FACTUAL BACKGROUND

5. On 2 October 2009 the claimant presented Case number 120166/2009 against her former employer and the respondent's predecessor, Strathclyde Joint Police Board ("the original claim") (P11). She claimed constructive dismissal, detrimental treatment for making a protected disclosure and disability discrimination. The claimant claimed to have made a protected disclosure on 13 June 2008 to Lee Wilson, Area Commander of Strathclyde Police ("the protected disclosure"). The claim was resisted. The respondent did not accept that the claimant had made a protected disclosure. In the event that the claimant had made a protected disclosure, which was denied, the respondent submitted that the claim was time barred. The original claim

was withdrawn by the claimant. It was withdrawn before a final hearing had taken place. Having been withdrawn, the original claim was dismissed under Rule 52 of the Rules of Procedure 2013 on 13 November 2013 (P15).

6. It is the claimant's position in the first claim that she made five applications for employment with the respondent on various dates between 5 November 2018 and 1 March 2019. It is the claimant's position that she was not invited to interview for two of the applications because she made the protected disclosure. The claimant attached a letter to her applications for employment with the respondent (P16) in which she refers to previous employment with Strathclyde Police and that she expressed '*concerns to my superiors and, as a consequence of this, I encountered resistance to my attempts to make changes to the way in which productions were being processed and stored*'.

7. It is the claimant's position in the first claim that, in the absence of any clear evidence to the contrary, it should be inferred that the reason for not being invited to interview for two job applications was because she made the protected disclosure.

8. In the first claim, the claimant relies on the original claim as a protected act ("the protected act") to show that she was victimised by the respondent by not inviting her to interview for two job applications. It is the claimant's position in the first claim that, in the absence of any clear evidence to the contrary, it should be inferred that the reason for not being invited to interview for two job applications is the protected act.

9. It is the claimant's position in the second claim that she made a job application to the respondent on 13 July 2019 for which she did not receive an offer of employment. As in the first claim, it is the claimant's position that it should be inferred that she did not receive an offer of employment because she made the protected disclosure. Similarly, it is the claimant's position in the second claim that the reason she did not receive an offer of employment from the respondent is the protected act.

10. The claimant has provided the respondent with papers said to date from 2008 and 2009 (P5 to P10) which include e mails from the claimant to Chief Inspector Lee Wilson (P5). Chief Inspector Lee Wilson retired from the respondent's employment a number of years ago. The claimant has provided a copy of the ET1 for the original claim (P11) and a paper apart from the response (P12).

STRIKE OUT UNDER RULE 37(1)(e) OF THE RULES OF PROCEDURE 2013

SUBMISSIONS

RESPONDENT'S SUBMISSIONS

11. The respondent provided the Tribunal with written submissions. What follows is a summary of the above. Dr Gibson submitted that the length of time between the alleged protected disclosure and the alleged detrimental acts is such that it is no longer possible to have a fair hearing in respect of the claims under Section 47B of ERA. Dr Gibson referred the Tribunal to the cases of **Peixoto v British Telecommunications plc EAT 0222/07** and **Riley v Crown Prosecution Service 2013 IRLR 966, CA.** Both cases are concerned with how an unknown delay stretching into the future might prejudice the possibility of having a fair trial. Dr Gibson submitted that some of the principles articulated in the above cases are applicable to a case in which the possibility of having a fair trial is prejudiced by delay stretching back in time. The finding in **Peixoto,** submitted Dr Gibson, that it was no longer possible to have a fair hearing was firmly rooted in Article 6 of the ECHR which lays down the right to have fair trail , including the right to a trial within a reasonable time. Dr Gibson submitted that, as in **Peixoto**, the current case is '*truly extraordinary*" as the respondent is expected to challenge a position which is now 12 years old. In the case of **Riley**, submitted Dr Gibson, the court held that if a party's doctor cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out the claim has to be an option available to the Tribunal.

12. When assessing the balance of prejudice, submitted Dr Gibson, the claimant does not get to the question of whether she suffered a detriment until she overcomes the hurdle of showing that she made a protected disclosure. The prejudice caused to the respondent of having to challenge what the claimant says was a protected disclosure in June 2008 is so overwhelming, submitted Dr Gibson, that the claim should be struck out on the balance of prejudice.

13. The respondent, submitted Dr Gibson, would have to challenge the claimant's position that she could have a reasonable belief that her disclosure of information involved her acting in the public interest and tended to show one or more of the relevant failures in terms of Section 43B (1) (a) to (c) of ERA. There are numerous complex issues contained in that legal test, submitted Dr Gibson and it would be extremely difficult for the respondent to lead evidence to discredit the claimant's position that she made a protected disclosure.

14. Dr Gibson referred to the papers provided by the claimant. He questioned the extent to which they relate to the purported protected disclosure, the passage of time since they were produced and that only two of the six people named in the correspondence are still employed by the respondent. Papers produced by the claimant, submitted Dr Gibson, are the only available documents, any other potentially relevant papers having been destroyed by the respondent some time ago.

15. The respondent's witnesses, submitted Dr Gibson, will be unfairly hampered in providing evidence as to what they made of the claimant's case at the time and whether they believed at the time that she was a whistle-blower or not. DI Wilson is no longer a serving police officer. His memory will have faded not only because of the passage of time but also from being removed from the day to day practices of his role as a police officer. Dr Gibson expressed concern that the claimant may be in a position to exploit the fading memory of the respondent's witnesses as regards the actual situation when the protected disclosure is said to have been made. The passage of time will also impede the recollection of the respondent's witnesses as regards the proper practices and procedures in place in 2008, submitted Dr Gibson and will impact on the respondent's ability to challenge whether the claimant could

have had a reasonable belief that her disclosure of information involved her acting in the public interest and tended to show one or more of the relevant failures in terms of Section 43B (1) (a) to (c) of ERA. It would be extremely difficult, submitted Dr Gibson, for the respondent's witnesses to recall the context in which the concerns were raised and to refute allegations made by the claimant. The claimant's genuine motive for raising matters will also be lost in the mists of time submitted Dr Gibson. It is fundamentally unfair to the respondent, submitted Dr Gibson, to be facing the allegation now.

16. Regarding the claim of victimisation, submitted Dr Gibson, the respondent will also be seriously prejudiced by the length of time period between the protected act and the alleged acts said to have caused detriment to the claimant. The respondent, submitted Dr Gibson, is expected to defend an accusation that persons within its HR department subjected the claimant to detriments in the period from January to March 2019 because she presented a tribunal claim in October 2009. The respondent, submitted Dr Gibson, will have to lead evidence to discredit an argument of victimisation by seeking to trace back some ten years or so to show why such an accusation is ludicrous. It will be virtually impossible to do so credibly and reliable and therefore the opportunity for the claimant to unfairly cast doubt on the respondent's evidence is significant, submitted Dr Gibson. The challenge to fairness by the respondent, submitted Dr Gibson, is that they are being put in the position of having to challenge an accusation that a decision to not offer the claimant an interview taken in January to March 2019 was done because a tribunal claim alleging disability discrimination was presented in October 2009. The matter was '*done and dusted*' submitted Dr Gibson in 2013. The respondent has undergone a huge operational change since then with changes to staff, systems of work, policies and procedures, submitted Dr Gibson. It will be virtually impossible, submitted Dr Gibson, for the respondent's witnesses to be in a position to confirm or deny that they had any knowledge of the claimant's tribunal claim against the respondent's predecessor. Due to the passage of time there is the significant risk, submitted Dr Gibson, of the Tribunal making adverse findings of credibility and reliability against the

respondent's witnesses in relation to their genuine denial of having had any involvement in or knowledge of the original claim.

CLAIMANT'S SUBMISSIONS

17. The claimant provided the Tribunal with written submissions. What follows is a summary of the above. As regards whether the claimant made a protected disclosure, Mr Meechan submitted that the evidence of the claimant is far more relevant and material than that of the respondent's witnesses. It is only the respondent who truly knows why the claimant has not been offered employment, submitted Mr Meechan, and the claimant should be given the opportunity to hear an explanation from their witnesses. The material question is why the respondent has treated the claimant the way it has now, submitted Mr Meechan, not some years ago. This evidence will not, submitted Mr Meechan, be affected by the passage of time.

18. This claim, submitted Mr Meechan, is not "*truly extraordinary*" as in **Peixoto** where the claimant was not physically able to give oral evidence and the case could not be decided on the documents alone. Mr Meechan referred to the observation in **Peixoto** that strike out a claim on the grounds that it is no longer possible to have a fair hearing is a "*draconic measure to be used sparingly*" in particular in relation to claims of discrimination. Mr Meechan submitted that the passage of time in this case is not such that the case cannot be tried.

19. Mr Meechan referred the Tribunal to the available documentary evidence from the time of the purported protected disclosure. He submitted that the respondent should have retained paperwork pertaining to the original claim. Whether, and to what extent, the protected disclosure influenced or caused the more recent detriments is evidence which should not be affected by the passage of time submitted Mr Meechan; the witnesses should know why they did not offer the claimant a role in relation to each application. Evidence that the witnesses cannot remember whether they were involved in the original claim must surely only strengthen the respondent's position that it did not influence their decision making in 2019, submitted Mr Meechan.

20. Mr Meechan referred the Tribunal to the case of **Hassan v Tesco Stores Limited UKEAT/0098/16** and the two-stage approach to be taken by the Tribunal when deciding whether to strike out a claim under Rule 37 of the Rules of Procedure 2013 . In this case, submitted Mr Meechan**,** should the Tribunal conclude that the grounds under Rule 37(1)(e) of the Rules of Procedure 2013 have been established, it should not go on to exercise its discretion to strike out the claim. In addition, submitted Mr Meechan, the application should be refused as it is not in accordance with the overriding objective.

DISCUSSION & DELIBERATIONS

21. Rule 37 1(e) of the Rules of Procedure 2013 provides that 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 the ground that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

22. The right to a fair trial under Article 6 of the ECHR includes the right to be heard within a reasonable time. Dealing with a case fairly and justly in terms of the overriding objective of the Rules of Procedure 2013 includes, so far as practicable, avoiding delay. It is recognised that the passage of time can adversely affect the quality of evidence. In the cases of **Peixoto** and **Riley** the Tribunal was entitled to strike out the claims on the ground that the lack of certainty as to when, if ever, the claimant might be able to give evidence made it no longer possible to have a fair hearing.

23. In the present case the claimant seeks to rely on a protected disclosure that she claims to have made in 2008. It is not in dispute that this is a considerable time ago. The protected disclosure is said to have been made when the claimant was employed by the respondent's predecessor and to a person who is no longer employed by the respondent. The onus to prove that there was a protected disclosure however rests with the claimant. When the protected disclosure was said to have been made, a "*qualifying disclosure*" meant any disclosure of information which, in the reasonable belief of the worker making

the disclosure, tends to show one or more of the relevant failures identified in Section 43B (1). It will be for the claimant to satisfy the Tribunal that the disclosure in question was a "*qualifying*" disclosure. She intends to give evidence in this respect. She has produced documents that are said to date from the time of the disclosure. The respondent will be allowed the opportunity to challenge the claimant's evidence. While the adverse effect of the passage of time on a person's ability to recall events is recognised, there is no suggestion that the person to whom the protected disclosure is said to have been made will be unable to give evidence.

24. It is not in dispute that the alleged detrimental treatment about which the claimant complains occurred within the recent past. There is no suggestion that the claims under Section 47B of ERA are time barred. An essential element of a claim under Section 47B of ERA is that of causation. The Tribunal must be satisfied that the claimant was subjected to detrimental treatment on the ground that she made a protected disclosure. It is not being suggested that the respondent's witnesses will be unable to recall why they did not invite the claimant to interview in November 2018 or offer her employment in July 2019. There is no suggestion that relevant paperwork is no longer available. While it will be for the respondent in terms of Section 48(2) of ERA to show the ground on which the alleged detrimental act was done, the onus remains with the claimant to show that there was a protected disclosure and that she was subjected to a detriment. The decisions not to invite the claimant to interview or offer her employment were made relatively recently and the prejudice to those involved by the passage of time in relation to that decision-making process will be limited and in particular whether any alleged whistle blowing by the claimant was a factor.

25. As regards the claim of victimisation, there is also no suggestion that those who made the decision not to appoint the claimant are unable to give evidence about their decision-making process. There is no suggestion that the relevant paperwork is no longer available. It is not in dispute that the claimant presented the original claim. In terms of Section 27 of EA, it will be for the claimant to show that she was subjected to a detriment because she brought

the original claim or to establish findings from which the Tribunal can infer such treatment. The decisions not to invite the claimant to interview or offer her employment were made relatively recently and the prejudice to those involved by the passage of time in relation to that decision-making process is limited and in particular whether the protected act of presenting a claim was a factor. The prejudice to the claimant of striking out the claims outweighs any prejudice caused to the respondent by the passage of time since the protected disclosure is said to have been made.

26. In all the circumstances the Tribunal is not persuaded that it is no longer possible to have fair hearing in respect of the claims under Section 47B of ERA. The application for strike out the claims under Rule 37(1)(e) of the Rules of Procedure 2013 is therefore refused.

STRIKE OUT ON GROUNDS OF RES JUDICATA

SUBMISSIONS

RESPONDENT'S SUBMISSIONS

27. Dr Gibson submitted that following the case of **British Airways plc v Boyce 2001 SC 510**, it is clear that the principle of *res judicata* applies to proceedings before the Tribunal. Subject to particular exceptions, submitted Dr Gibson, *res judicata* applies to all points upon which the Tribunal has formed an opinion and pronounced a judgment and every point which the parties, exercising reasonable diligence might have brought forward at the time. Dr Gibson submitted that in this case, *res judicata* applies because the Tribunal has pronounced a judgment dismissing a claim of detriment based on the same protected disclosures which the claimant now seeks to rely on, again claiming detriment. It does not matter, submitted Dr Gibson, that the alleged detriment is different.

28. The respondent, submitted Dr Gibson, are entitled to rely on the principle of *res judicata* to argue that the question of whether the claimant made a protected disclosure in terms of Section 43B of ERA has already been the subject of judicial determination by the withdrawal judgment. The claimant,

submitted Dr Gibson, is not entitled to a second bite of the cherry by seeking to show that she made a protected disclosure in June 2008. When withdrawing her claim, the claimant did not seek to reserve the right to bring a further claim against the respondent raising the same or substantially the same complaint submitted Dr Gibson. The claimant was not in effect, submitted Dr Gibson, reserving her right to state for a second time that she was a whistle-blower. The withdrawal judgment, submitted Dr Gibson, is effectively a judicial determination that the claimant was not a whistle blower in 2008. There is therefore, submitted Dr Gibson, an absolute bar to the resurrection of the withdrawal claim in the Tribunal.

29. Dr Gibson referred the Tribunal to the English doctrine of estoppel, equivalent to personal bar in Scotland, and the case of **Arnold v National Westminster Bank plc 1991 AC 93**. In **Arnold**, the court held that *issue estoppel* may arise when a particular issue "*forming a necessary ingredient in a cause of action*" has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action of which the same issue is relevant, one of the parties seeks to reopen that issue. *Cause of action estoppel* applies where a cause of action in a second action is identical to a cause of action in the first, the latter being between the same parties and having involved the same subject matter. In such a case there is an absolute bar on in relation to all points decided in the first cause of action. In the present case, where there has been a withdrawal judgment, it is possible to argue that both forms of estoppel apply, submitted Dr Gibson.

30. Dr Gibson submitted that as a claim under Section 47B ERA does not get off the ground without a finding that the claimant made a protected disclosure in terms of Section 43B ERA it must follow that by relying upon exactly the same purported protected disclosures the claimant is advancing an identical cause of action. Without a finding that she made a protected disclosure, no cause of action arises, submitted Dr Gibson. By withdrawing the original claim, submitted Dr Gibson, the claimant abandoned her right to re-argue that she made a protected disclosure in June 2008. The claimant is unable to rely on a finding in the original claim that she made a protected disclosure. Her claim

was withdrawn without any caveat that she reserved the right to re-litigate the point. It was clearly the claimant's intention, submitted Dr Gibson, to abandon her claim in its entirety which included a judicial determination to dismiss a claim that she was a whistle-blower in 2008. The claimant, submitted Dr Gibson, cannot now seek to re-argue that point.

CLAIMANT'S SUBMISSIONS

31. Mr Meechan submitted that the claim under Section 47B ERA is not the same matter on the same grounds as raised in the original claim. Mr Meechan submitted that a subsequent claim is not precluded on the grounds of *res judicata* if the second action is based on a different matter and/or on different grounds. In the present case, submitted Mr Meechan, the detriment is more recent and subsequent to the original claim and is not precluded by the principle of *res judicata.*

32. In the case of **Boyce**, submitted Mr Meechan, the Court of Session described a second claims of race discrimination as being "*in terms identical to those of the earlier application with the single exception that emphasis is now placed on the "national origins" aspect of the definition rather than "ethnic origins*"." The present case, submitted Mr Meechan, is an entirely new claim involving a detriment that did not from part of the original claim in 2009. In **Boyce**, submitted Mr Meechan, there had been lengthy litigation including evidence and appeals. The original claim, submitted Mr Meechan, was withdrawn before any hearing of evidence, legal argument or submissions. It is the claimant's position, submitted Mr Meechan, that she withdrew her claim because of funding concerns and the threat of expenses.

33. The principle of *res judicata* does not apply in the present case, submitted Mr Meechan. There was no settlement and no legal argument in the original claim. The current case is concerned with a detriment which occurred recently within the relevant time limits, submitted Mr Meechan, and the claim should be heard by the Tribunal.

DISCUSSION & DELIBERATIONS

34. The policy behind the doctrine of *res judicata* is a concern for finality in litigation between the same parties, the need to avoid a multiplicity of identical proceedings and a desire to prevent abuse of the legal process which guarantees access to justice. Parties are entitled to finality in litigation. They are entitled to proceed on the basis that once determined the same matter will not be re-litigated. The doctrine of *res judicata* restricts parties from litigating claims which have already been determined or should have been brought in earlier proceedings.

35. The respondent seeks strike out of the claims under Section 47B of ERA on the grounds that they are *res judicata*. The right which the claimant seeks to enforce under Section 47B of ERA is not to be subjected to any detriment by any act, or deliberate failure to act, by her employer done on the ground that she made a protected disclosure.

36. It is not in dispute that the original claim was dismissed following withdrawal by the claimant. There was no determination following a hearing on the merits of the original claim. Significantly, there was no determination of whether the claimant had made a protected disclosure. The claims are not concerned with the same alleged detriments. There is a significant lack of similarity between the original claim and the current claims. The alleged detriment complained of in the present claims is said to have occurred at a time significantly after the date of the original claim and to have involved different individuals. The present claims are concerned with alleged detrimental treatment on the basis of the respondent being the claimant's former employer. The cause of action is different. The purported protected disclosure and/or protected act in all three claims may be the same but the alleged detriments are entirely different.

37. In all the circumstances, the Tribunal was not persuaded that the claims should be stuck out as *res judicata*. The application for strike out the claims is therefore refused.

Employment Judge: F Eccles
Date of Judgement: 19 March 2020

Entered in Register,
Copied to Parties: 20 March 2020