EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100189/2020 (V)

Preliminary Hearing Held Remotely on 16 November 2020

Employment Judge A Kemp

Ms A Spence	**Claimant** **Represented by** **Ms A Stobart** **Counsel** **Instructed by** **Ms A Salt** **Solicitor**
Dundee City Council	**Respondent** **Represented by** **Ms M Geddes** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The application to strike out the claims under Rule 37 is refused.**

2. **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 a deposit order.

2. There have been two Preliminary Hearings held prior to the present hearing, both of which were before me. The claimant pursues claims under

sections 15, 19, 20, 21 and 26 of the Equality Act 2010 and for an alleged unlawful deduction from wages under section 23 of the Employment Rights Act 1996. In the Note following each of the earlier hearings a list of issues was drafted, the second being amended after concessions by the respondent. Neither party has taken issue with the draft list of issues.

3. The respondent admits that the claimant is a disabled person under the 2010 Act, but denies having actual or imputed knowledge of some aspects of her disability as I shall come to.

4. I was provided with a Bundle of Documents, a further document from the claimant, authorities from each side, and a detailed written submission helpfully prepared by Ms Geddes for the respondent.

5. The parties had also exchanged witness statements I was informed, and the papers passed to me by the administrative staff included those of the claimant and her witnesses, but not those of the respondent (which have not yet been sent to the Tribunal). It was agreed during submissions that it was not necessary for me to read those witness statements.

Submissions

6. The following is a summary of the submissions made by each party.

(i) Respondent

7. Ms Geddes spoke to and supplemented the detailed written submission she had prepared. She set out the claims made, including the statutory provisions founded on by the claimant, and referred to the Claim Form and Further and Better Particulars. She referred to the cases with regard to strike out referred to below, ***Mechkarov, Ezsias***, and ***Tayside*** (both at Inner House and EAT)***,*** and to ***DWP v Alam EAT 0242/09*** and ***Salford NHS Primary Care Trust v Smith EAT 0507/10***. If the Tribunal did not accept her primary submission for strike out, her secondary submission was for deposit order, under the terms of Rules 37 and 39 respectively.

8. She commenced by considering the issue of actual or imputed knowledge of the respondent. She accepted that the respondent was aware of the claimant having the condition of scoliosis, but not that that had the effect

that the claimant could not stand for 50 minutes. The claim made was said to have commenced on 16 August 2018. She argued that there was nothing in the Occupational Health (OH) reports or medical records from the claimant which referred to a period of time during which the claimant was unable to sit, stand or walk. The respondent accepted that it had been informed that she should avoid duties involving standing or walking for more than 20 minutes, and to provide suitable seating if she was sitting for more than 10 minutes. She argued that the respondent had done so, and that those adjustments succeeded in avoiding any disadvantage. The claimant's absences had largely ceased. The claimant accepted in her Further and Better Particulars that she could do the lunch duty "sometimes". The pleadings were, she argued, "all over the place". She referred to the terms of three OH reports the respondent received, dated in September, October and November 2018. She accepted that the claimant could give oral evidence and that written evidence was not always required.

9. She turned to the claim of harassment under section 26 of the 2010 Act. The incident of 16 August 2018 took place over a year before the claimant went off sick, and no reference had been made to it before the ET1 was presented on 14 January 2020. The respondent was entitled to fair notice of the case to be met. It could not be discriminatory to ask if the claimant was fit to do what she was employed to do. The claimant's pleadings gave the answer as to why she was upset, that she had used the wrong term for Ms Nesbitt. There was no basis for the claim made.

10. The next claim addressed was for reasonable adjustments, under sections 20 and 21 of the 2010 Act. She argued that although the PCP of lunchtime duties was accepted, nothing was said about the substantial disadvantage that that caused disabled persons or the claimant. The Further and Better Particulars contained an admission that the claimant had done the lunch duty five days per week, save when meeting with pupils. Undisputed documents show that she did so in the period November 2018 to August 2019. The pleadings referred variously to "request" and "demand". The claimant now accepted in her Further and Better Particulars that staff could sit, stand or walk during lunch. If the claimant was in pain that was

at odds with the OH reports and her own pleadings at paragraphs 7, 12, 17 and 20. The respondent's position was that they had made adjustments for what they understood was the concern, and that that had removed any disadvantage, including a flexible start time, storing a chair for the claimant in the dining hall, and being free for 30 minutes before lunch duty to stretch or take medication. Those adjustments worked, as the claimant then did do the lunch duty from November 2018 to August 2019. She referred to calendar entries for the claimant, and to a photograph of a standard chair and what were referred to as "button chairs" which the claimant herself had referred to.

11. Ms Geddes referred to the claimant's medical records, and what she said was the absence of entries in relation to pain in relation to lunch duty. She also referred to a letter from the head-teacher Mr McAninch on 27 January 2020, which was redrafted following representations by the claimant, and which recorded that she was not in pain for the period November 2018 to June 2019. That showed that there was no substantial disadvantage, and without that there is no claim under this section.

12. She moved to section 15. She referred to the messages from Mr McAninch, and suggested that they could not be taken as treating her unfavourably. There was no specification of his alleged comments in relation to her absences and the school being in a bad state. The OH referrals were made for appropriate reasons given the circumstances. That could not be unfavourable treatment. Nor was contacting the claimant during absence. The issue of alleged pressure to carry out lunch duties she had dealt with as the respondent did not have knowledge of that.

13. She turned to issues of harassment directed to Mr McAninch, and denied that each of the matters that the claimant sought to rely on could properly be regarded as harassment. She complained of a lack of notice or adequate specification in some respects.

14. In respect of the claim of indirect discrimination she argued that there was nothing pled as to give fair notice of the claim.

15. Finally she argued that there was no basis for the claim of unlawful deduction from wages. The claimant's fit notes had stated that she was

not fit for work during the relevant period, and reference was made to payslips that had been produced.

16. She concluded by arguing that there was either no, or little, reasonable prospects of success for the claims and sought a strike out, or deposit order.

(ii) Claimant

17. Ms Stobart for the claimant argued that there was not a sufficient basis for either order to be made. She referred to ***Anyanwu*** which is also referred to below. She addressed initially the matter of actual or imputed knowledge, which she argued had become a cornerstone of the respondent's case. The claimant stated in her Claim Form that lunch duty had a huge effect on her disability. The respondent knew of the condition of scoliosis and that it would only get worse. The impact of her condition on the ability to undertake lunch duty had been canvassed in 2017, and she referred to the OH report dated in September 2017. She referred to the Further and Better Particulars at paragraph 40, and to a note of a meeting with the former head teacher on 8 March 2018, after which what she said had been a reasonable adjustment was made by the respondent. She referred to an OH referral on 20 September 2018 and to the OH reports thereafter. She referred to a letter sent to the claimant on 27 January 2020 and argued that the respondent's knowledge was clear.

18. She then addressed the section 15 claim, and argued that the Tribunal would require to determine whether the comments made were not appropriate, having regard to the effect on the claimant. If further specification was sought by the respondent that could be provided. Each matter cannot be determined in isolation, and there can be an alternative explanation for what was done. The impression was that the respondent did not believe the claimant and that is why she was sent for three OH assessments in three months. The evidence of a document and its meaning did not come only from the words used, which should all be determined at a hearing.

19. On the section 19 claim she argued that the PCP was agreed, and the claimant's position is that that put her at a particular disadvantage being

that she was in pain. The threshold for that was low, and this was not a personal injury claim. It was something that the claimant could give evidence about. The respondent argued that the claimant could not have been in pain as she did not disagree with the contents of the letter sent to her on 27 January 2020, but in that letter she states that standing makes her spine “raw and inflamed”. She also referred to implementing the OH recommendations. She further referred to the list of issues. Ms Stobart stated that the claimant can refer in evidence to the diary entries the respondent produced, and the issue could not be determined at this hearing. Only one of the disadvantages was needed for the claim, and it was then a weighing up exercise for the Tribunal. She made similar submissions in relation to the section 20 claim, on which the same PCP is based.

20. On the harassment claim under section 26 she stated that that was all based on factual matters in dispute which could only be determined by hearing evidence. Although it may be that failing to attend a meeting was because an earlier one overran, that can also be seen in the context of a series of actions.

21. She turned to the unlawful deduction from wages claim, and stated that that was in the same category and would have to be determined by the Tribunal.

22. In summary she argued that because someone fights through pain to carry out lunch duties it does not follow that they do not suffer disadvantage. Paragraph 23 of the Claim Form referred to disadvantage. The medical notes, including those on 16 October 2018 and 23 April 2019 refer to pain. These were issues of fact to determine after hearing evidence. She referred to the email to the Tribunal from the respondent on 8 September 2020 which said that the facts were heavily disputed.

23. On the issue of the alleged remark to Dr McCormack about the claimant she disputed that this was vexatious and should be struck out. Either the claimant was told that, or she was lying. The Tribunal would have to determine that.

24. The case was she argued a strong one with reasonable prospects and the applications should be refused.

Law

25. 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**
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> 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
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> (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."

(i) Strike out

26. Rule 37 provides as follows:

> "**37 Striking out**
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> (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—
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> (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……

(e) 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)"

27. 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).

28. 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."

29. 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."

30. 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 there 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. 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."

31. 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)."

32. 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, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

33. That it is competent to strike out a discrimination claim 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."

34. In ***Mechkarov v Citi Bank NA [2016] ICR 1121*** the EAT summarised the law as follows:

> "(a) only in the clearest case should a discrimination claim be struck out;
> (b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
> (c) the claimant's case must ordinarily be taken at its highest;
> (d) if the claimant's case was 'conclusively disproved by' or was 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it could be struck out;
> (e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

(ii) Deposit

35. Rule 39 provides as follows:

> "39 **Deposit orders**
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> 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….."

36. 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.
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> [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.
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> [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

37. The test for strike out is a high one, as Ms Geddes properly accepted. The respondent was in effect seeking conclusively to disprove the claimant's case with reference to her own pleadings and what was said to be undisputed contemporaneous documents, but I do not consider that the high test described in the case law, including that of being totally and inexplicably inconsistent with such documents, is met.

38. The first issue addressed in submission by Ms Geddes was the actual or imputed knowledge of the respondent in relation to the claimant's

disability. Whilst it is true that the ***Alam*** case refers to the actual or imputed knowledge of the extent of the disability, that is an issue of fact. Ms Stobart took me to the terms of earlier OH reports than those referred to by Ms Geddes, and a note of a meeting with the former head teacher, which on the face of them appeared to support a suggestion that the respondent knew what the claimant was alleging about her inability to stand for more than ten minutes without experiencing pain. This is a question where the focus is on what exactly the respondent did know, or what it ought reasonably to have known. It is therefore potentially affected by what the respondent's own witnesses say in answer to questions in cross examination. I considered that there was at the least a basis put forward by Ms Stobart in the matters she drew to my attention. This aspect of the respondent's submission did not meet the test to which I have referred.

39. The second issue addressed in submission was whether or not there was a substantial or particular disadvantage suffered by the claimant. Ms Geddes argued that there was not, as the claimant had in fact undertaken the lunch duty, and there was evidence that suggested that for a material period, the precise extent of which varied but included the period November 2018 to August 2019, it was said that the claimant did not experience pain, and could not therefore have suffered any substantial disadvantage. She relied on a letter dated 27 January 2020 sent to the claimant, and revised after she raised issues but not in relation to a statement that the claimant had not experienced pain, and the medical records. Ms Stobart countered that by stating that the claimant's evidence would be that she did suffer pain, and was to the effect that she worked through it on those days when she did experience pain, during lunch duties, when it had been a reasonable adjustment not to require her to do so. She referred to some aspects of the documentation which may support that, at least in part, and I refer to that further below.

40. Against that background it did not appear to me that this aspect of the submission by the respondent met the test to which I have referred. It is part of a core body of disputed fact, which can only properly be determined after hearing the evidence. The terms of the pleadings, and of the documentation on which the respondent relied, do not in my judgment

meet the test as explained in ***Mechkarov*** of where the claim was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents.

41. I took into account when coming to that conclusion firstly that the claims include those of discrimination in which there is a strong public interest in having them determined following evidence, and secondly that if there is a full hearing that is conducted by a full Tribunal and not by a judge sitting alone.

42. Ms Geddes also invited me to make assumptions about documents, particularly those not written by the claimant herself, or to draw inferences from them. I do not consider that that is appropriate at this stage as a basis for strike out. It is all the more difficult to argue for something being conclusively disproved, or inexplicably inconsistent, where that relies on an assumption or an inference. Where there is a dispute about the inferences to be drawn from the primary facts, and if those primary facts are not disputed, a strike out is not I consider appropriate. In ***Zeb v Xerox (UK) Ltd UKEAT/0091/15*** the EAT stated that

> "the question of what inferences to draw forms part of the critical core of disputed facts in any discrimination case".

43. Ms Geddes made submissions in relation to the section 15 claim, pointing to the terms of the WhatsApp message sent by Mr McAninch to the claimant, saying that he did so on behalf of the SLT (presumably the senior leadership team). The claimant complains that that was a form of public comment, which Ms Geddes says cannot have been improper or unfavourable treatment. Looking at the terms of that message in isolation it is not easy to see why it may be unfavourable to the claimant, but it is not beyond the bounds of possibility that it could be so considered, dependent on the evidence as a whole. It may depend on context, and what is said in evidence both by the claimant and Mr McAninch, and perhaps other witnesses, on other matters.

44. In respect of the claim for reasonable adjustments under sections 20 and 21 of the 2010 Act, the respondent founded on the ***Salford*** case. It was argued that it meant that its purpose was to retain a person in work. I do

not consider that it goes as far as that. In that case, pursued on the basis of the Disability Discrimination Act 1995, the EAT stated at paragraphs 48 and 49:

> "…. Any proposed reasonable adjustment must be judged against the criteria that they must prevent the PCP from placing her at the substantial disadvantage.
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> Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage as we have set it out above are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify."

45. The basic argument for the claimant is that standing for over 10 minutes causes her pain, and that if she is to sit for a prolonged period she should have an appropriate chair to avoid suffering pain. That is what she claims to be the substantial disadvantage of the PCP – pain. It is at the least arguable that if she is right on that, the adjustments she argues for, or some of them, ought to have been made by the respondent. She also argues that adjustments that the respondent claims it made were not made, or were not always made. I do not consider that the authority founded on by the respondent must lead to the conclusion that her claim in this regard must fail.

46. For similar reasons I concluded that the argument for the respondent in relation to the harassment claim under section 26 of the 2010 Act could not be accepted. Whether the conduct founded on was unwanted is a matter of fact, whether it created an environment for the claimant falling within the section is a matter of fact, where there are issues of perception on the part of the claimant and the reasonableness of that perception to consider. These are obviously issues of fact, and the facts are disputed. These can I consider not be determined on submission in the present case, and require evidence to be heard.

47. I came to the same conclusion on the claim for unlawful deduction from earnings, which is liable to be affected to a material extent by the success or failure of the claims under the 2010 Act.

48. In each of the aspects of the claims made there is, I consider, a core body of disputed facts. I note that it appears to have been conceded by the respondent in its email on 8 September 2020 that the facts of the case were "highly disputed" by the parties. I also noted the concession made by Ms Geddes, entirely properly, that it was possible for the claimant to give oral evidence on the disputed fact, and if so it is possible that that evidence may be accepted by the Tribunal, and that is so even if documentation at face value contradicted her position.

49. The height of the hurdle that the respondent must overcome was made clear in the case of ***Ukegheson***, in which the EAT made the following comments on the claims there made of race and sex discrimination which the Tribunal had struck out:

> "This seems to me to be something of a long shot. But I cannot say that it is completely out of the question and therefore I cannot say that, on the basis on which the judge approached it, or in any event, the decision is plainly and unarguably right. It might be, but it may not be. It needs the evidence to be heard to evaluate the facts."

50. I do not consider that the respondent's argument that there are no reasonable prospects of success clears such a hurdle either when the points are considered individually, or as a whole.

51. Ms Geddes separately complained about what she said was a lack of specification of some of the claims. The pleadings are not as clear as they might be in some instances, but are to be read subject to the further and better particulars of claim. I consider reading the Claim Form as a whole that the claimant does give adequate specification of the claims she is making. She sets out the matters on which she relies for each of the sections of the 2010 Act on which she founds at paragraphs 34 -41 of the Claim Form. The respondent sought further particulars, and was given them.

52. In the event that the respondent wishes to seek additional specification, it is entitled to ask for further such particulars. If not provided, it may seek them as an order for information under Rule 31. It can, if it chooses, not seek such specification and make arguments on the absence of

specification as it sees it either during the hearing of evidence or by submission or both. It is I consider not in accordance with the overriding objective, or authority, to strike out a discrimination claim on the basis that there is imperfect pleading.

53. The respondent argued that it did not have fair notice of any claim of indirect discrimination, for example, as it claimed that there was no particular disadvantage pled for the claim of indirect discrimination. I do not agree. Reading the pleadings as a whole it is I consider clear that the disadvantage pled is pain from standing for more than 10 minutes means that the claimant is unable to undertake lunch duty, derived from a combination of paragraphs 7 and 40. It is also alleged, for example, that there is pain on sitting and that that requires provision of an appropriate chair (paragraph 17 by reference to an OH report). If there is any lack of clarity about particular disadvantage from the pleadings, and I did not consider that there was, I consider that that was alleviated if not removed by the list of issues referred to above.

54. The standard of pleading required in an employment tribunal is not the same as that required in a civil court action. There is no particular Rule that provides for the degree of specification required. The purpose of the pleadings, in the Claim Form, was explained as being to enable the parties to know in advance reasonable details of the nature of the complaints that each side is going to make at the hearing - ***White v University of Manchester [1976] IRLR 218***. Whilst there is a power in Rule 31 to order information, normally called further and better particulars, where the nature of a party's case has already been stated with reasonable clarity that may be refused - ***Honeyrose Products Ltd v Joslin [1981] IRLR 80***

55. It is true that in ***Halford v Sharples [1992] ICR 146,*** the EAT stated that the trend should be towards greater formality in pleadings and procedure on what it termed the county court model, and that employment judges should exercise a tight control of the proceedings at the interlocutory stage, in order to ensure fairness and orderliness at the substantive hearing, but the requirement of pleading was described by the Court of Appeal as minimal in ***Parekh v London Borough of Brent [2012] EWCA Civ 1630***, in which it was said that:

> "A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal".

56. In ***Chandhok v Tirkey [2015] IRLR 195*** the EAT upheld the decision of an employment judge refusing to strike out at a preliminary stage an amended race discrimination claim on the basis that a tribunal could only reach a decision about this after hearing and determining the full facts. The EAT reiterated that the cases in which a discrimination claim could be struck out before the full facts had been established are rare.

57. More recently in ***C v D UKEAT/0132/19*** the EAT gave guidance on the pleading of a Tribunal claim as follows:

> "11…….I do not encourage parties, particularly lawyers, to engage in that type of 'narrative' pleading. I would encourage legal representatives, in particular, to adopt a more succinct and clear drafting style. Whilst I do not suggest that the employment tribunal is a forum in which meticulous or unnecessarily pedantic pleading points should be raised, I do consider that, increasingly, there is a need to refocus on the purpose of a claim form, a formal document which initiates legal proceedings.
>
> 12. A claim form sets out a legal claim. It is not a witness statement (although in this case both the Claim Form and Response in this case bear many similarities to a witness statement). Ideally, in a Claim Form, the author should seek to set out a brief statement of relevant facts, and the cause of action relied upon by the Claimant. The purpose of doing so is to allow the other side to understand what it is that they have done or not done which is said to be unlawful. It should be clear from the document (Claim Form) itself, within the brief summary of the relevant factual events, which facts are relevant to which claim, if more than one is advanced. The Respondent can then properly respond to that claim or claims. The Respondent can admit, not admit, or deny the facts and claims asserted by the Claimant and, where appropriate, set out a brief summary of the relevant facts the Respondent asserts occurred.

> Lawyers will, or should, understand, that each of the phrases 'admit, not admit, or 'deny' have a particular meaning in this context. The task in hand, when setting out a Claim or Response (certainly for an instructed lawyer) is to distil the relevant factual matters to their essential or key component parts."

58. In the present case I consider that the pleading of the claims made by the claimant is at least adequate. It meets the standard as set out in the authorities to which I have referred. It narrates succinctly what are said to be the relevant facts, sets out the statutory provisions, and under each of those provisions sets out which of the facts are said to be relevant for the claim made under it. In my judgment that is all that is required of the claimant in a case such as the present, and the very careful, detailed and meticulous scrutiny of the pleadings which Ms Geddes made is only in the rarest of case likely to be sufficient to lead to a strike out of a discrimination claim.

59. In any event there is separately the list of issues not disputed by either party to which I have referred, which sets out in some detail what is relied on by the claimant for each of the claims she makes, and includes for example the respective disadvantages she claims to have suffered as a result of the PCP for the purposes of the claims under sections 19 and 20 of the 2010 Act, which provide I consider adequate specification and fair notice for those matters where the initial pleadings had been less specific.

60. Ms Geddes argued that the claimant's pleadings were "all over the place". I do not consider that that is a fair summary of them. Whilst there are differences in details, there is a reason for that. For example, in paragraph 7 the claimant claims that she cannot stand for more than 10 minutes without pain. In paragraph 17 there is reference to her not standing for more than 20 minutes. But that latter paragraph is specifically quoting from an OH report commissioned by the respondent. There is no inconsistency between those two paragraphs, as they deal with different matters. It is also noted that the claimant's condition deteriorated, in paragraph 16.

61. There is a separate matter that requires to be considered. Oral evidence will be given by, I was informed, five witnesses for the claimant and 12 for

the respondent. Each will be cross examined and may be re-examined. Written witness statements have already been exchanged, an order for which was made at the last Preliminary Hearing. I understand that Ms Stobart had not been provided with them, and Ms Geddes had not yet had a chance to read them. Once Ms Geddes does however have an opportunity to read them, she will be aware of what evidence will be given in chief for the claimant, and will either have notice of the detail of the matters founded on, or be able to ascertain the absence of such detail. She may either then seek to provide additional evidence to respond to that in the event that she considers that that is required, or object to evidence for which she may consider that there is no pleading, or put the point in submission, or a combination of those possibilities (and there may be other means of responding not set out in this sentence). There is likely to be some months before a hearing date is to commence, such that there is likely to be a sufficient period of time to consider matters, take instructions, and decide on a course of action.

62. There is no particular aspect of Rule 37 referring in terms to fair notice in pleadings, but there is to the issue of a fair hearing in sub-paragraph (e), which I consider can include the matter of fair notice. As set out above I consider that that has been given, and in any event I consider that a fair hearing remains possible as the respondent may if it wishes seek additional information from the claimant either voluntarily or by order. Ms Stobart has stated that if requested such further and better particulars will be given. They were provided voluntarily by the claimant earlier. Whilst Ms Geddes argued that it was not for the respondent to do the claimant's job for her, and that the claimant should plead her case adequately, she has a potential remedy if she wishes to seek it should she not accept that she has had adequate notice in any respect.

63. Ms Geddes further argued that the terms of paragraph 28 of the ET1 were scandalous or vexatious, and should be struck out. Ms Stobart disputed that. That paragraph contains allegations of what Dr McCormack is said to have been told by Mr McAninch, which the doctor then is said to have reported to the claimant. The claimant, I was informed, is to give evidence on that, and can be cross examined. The respondent referred to the fact

that Dr McCormack was not a witness for the claimant. It can, if it chooses to, consider whether to seek to call Dr McCormack itself. The respondent can, if it chooses to, not do so and refer to the fact that the claimant is, I understand, not to call Dr McCormack but could have done so. These are matters which can be considered by the Tribunal hearing the evidence, and can do so in the light of all of the evidence it has heard, any objections and the submissions made. I do not consider that the allegations in paragraph 28 meet the test in the Rule, or separately in any event that it is appropriate having regard to the overriding objective to strike that paragraph out. In the event that the claimant has not been truthful about that matter that can then be considered should an application for expenses be made following the Final Hearing and Judgment.

64. The conclusion that the claim or a part of it should not be struck out 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 by each of the parties is to be accepted. 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. Ms Geddes raised issues before me which are matters that the respondent will be able to raise with the claimant in cross examination.

65. In summary, 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 must be dismissed.

(ii) Deposit order

66. 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 payment of a deposit. That is because I cannot conclude from the matters placed before me that the claimant has little reasonable prospects of success. The decision must be made following evidence on disputed matters of fact. Whilst there are some documents that assist the respondent at face value,

what is not known is what the claimant or other witnesses may say about them. Many of the documents founded on by Ms Geddes were not those prepared by the claimant, but by the respondent or someone acting on their behalf, such as occupational health. An example was a letter written by Mr McAninch following a meeting, which purported to record a statement from the claimant that she had not felt pain in a particular period. Ms Stobart stated that that matter was not accepted, although she could not point to a document setting out that disagreement, and did not have full instructions directly from the claimant. Not all evidence however is written. Oral evidence can be given which explains written words, or sets them in context such that their import is affected. That also applied to other aspects of the claim, including for example that under section 15 where at first look the message from Mr McAninch is not obviously unfavourable treatment, but for the reasons set out above may be held to be after evidence is heard.

67. For the reasons set out by Ms Stobart, and discussed in relation to strike out above, there are matters which the claimant is able to give evidence on which, if accepted, may lead to a finding in her favour, at least in part.

68. In light of that, I have concluded that this is not a case in which I can determine that there are little reasonable prospects of success under the terms of the Rule. I have therefore refused the application under Rule 39.

Conclusion

69. I have refused the applications for strike out and a deposit order.

70. I have referred in this Judgment to some authorities not canvassed before me in submission. I did not consider that it was necessary, having regard to the overriding objective, to defer making a decision until after the parties had commented on them, but in the event that the respondent considers that it has suffered prejudice by my doing so, and wishes to make submissions in relation to those authorities, it may do so by an application for reconsideration under Rules 70 – 72.

71. The case shall now proceed to a Final Hearing. Notice of the same shall be given to the parties separately and in due course.

Employment Judge: **Alexander Kemp**
Date of Judgment: **25 November 2020**
Date sent to parties: **25 November 2020**