



# EMPLOYMENT TRIBUNALS

**Claimants:** (1) Ms L Kelly  
(2) Ms L Wellings

**Respondent:** Sense, The National Deafblind and Rubella Association

## PRELIMINARY HEARING

**Heard at:** Midlands (East) (in public; by CVP)

**On:** 19 November 2020

**Before:** Employment Judge Camp

### Appearances

For the claimants: in person, assisted by Mr D Micklewright (lay representative)

For the respondent: Mr J Morris, solicitor

## REASONS

1. This is the written version of the Reasons given for paragraph (2) of the Judgment of 20 November 2020 – “*The respondent’s application to strike out part of the claim of the first claimant, Ms Kelly, pursuant to rule 37(1)(a) or for the Tribunal to make a deposit order under rule 39 is rejected*” – written reasons for that paragraph having been requested by the respondent. By way of background, please see the “*Case Summary*” section of the written record of the hearing, in particular paragraphs 51 to 53.
2. I am now considering an aspect of a strike out/deposit order application which has been made on the respondent’s behalf by Mr Morris, solicitor for the respondent. It relates to Ms Kelly’s claim, that is claim 2601773/2020.
3. Ms Kelly’s claim is different from the claim I was dealing with earlier in this hearing, that of Ms Wellings, in that Ms Kelly’s claim, although it is also a whistleblowing claim, relates to things that happened when she was still employed. There is a list of alleged detriments that she is relying on, from page 220 of the file. The first detriment is dated 19 June 2019 and the last 17 February 2020.
4. When we discussed at the start of this part of the hearing how we were going to proceed with the respondent’s strike out / deposit order application, Mr Morris made a sensible suggestion that I adopted, which was that we should look first at the allegations around 17 February 2020. If it turned out that those allegations had no reasonable prospects of

success then time limits would very much be in issue, because Ms Kelly's claim has only been presented within the primary time limit of 3 months plus early conciliation extension if those allegations remain part of it. If those allegations are not struck out then the argument would become over whether there was an "*act extending over a period*" or a "*series of acts or failures*" under section 48 of the Employment Rights Act 1996, and that is an argument it is unlikely to be possible for the Tribunal to resolve other than at a final hearing.

5. We have, then, been looking at what the claimant alleges about 17 February 2020. The claimant has provided further information about that in accordance with the Tribunal's orders. I refer to page 226 of the file prepared by the respondent for this hearing, which contains a description of various things that happened.
6. In terms of the law, I take into account, in particular, paragraph 24, part of Lord Steyn's speech, of the House of Lords' decision in Anynanwu v Southbank Student Union [2001] ICR 391 and paragraphs 29 to 32 of the Court of Appeal's decision in North Glamorgan NHS Trust v Ezcias [2007] EWCA Civ 330. When assessing whether a claim has "*no reasonable prospects of success*", the test to be applied is whether there is no significant chance of the trial Tribunal, properly directing itself in law, deciding the claim in the claimant's favour. Subject to one proviso, in applying this test I must assume that the facts are as alleged by the claimant. The one proviso or qualification is that I do not make that assumption in relation to any allegation of fact made by the claimant so implausible that I think there is no significant chance of any Tribunal accepting the allegation as true.
7. I note that striking out a tribunal claim, particularly one such as this one involving complaints of whistleblowing detriment and disputed allegations of fact, is an exceptional thing to do and that before I will do so the respondent has to cross a very high threshold indeed. Equally, however, the overriding objective is not served by permitting claims that are bound to fail to continue. Doing so benefits no one, least of all the claimant.
8. The law as to the meaning of "*little reasonable prospects of success*" in rule 39, which relates to deposit orders, is not as clear as perhaps it should be, but my understanding of the test I have to apply is that it is the same as that set out above in relation to "*no reasonable prospects of success*" but with the word "little" replacing the word "no" in the phrase "*no significant chance*".
9. In either case, I have to take the claimant's case at its reasonable highest. It is very rarely going to be possible for a Tribunal at a preliminary hearing to say that there is no or little reasonable chance of a different Tribunal at the final hearing deciding that the facts are not as alleged by the claimant. It is supposed to be summary determination. It is not supposed to be a mini trial. I am not hearing evidence about what happened. That would be a trial of a preliminary issue of fact and that is not what we are about today.
10. When I examine the claimant's allegations, she is certainly not alleging something that is inherently ridiculous or fantastical, or something else in relation to which I could say, "That is never going to work". It is also not one of those cases where there is a document

that the claimant is alleging says x, y and z that I can read and see that in fact it says a, b and c. It is not that kind of case.

11. The alleged detriments of 17 February 2020 relate to what was allegedly said at a meeting. It was not a minuted meeting and at the final hearing it is largely going to be the claimant's word against that of Mr Shaw, who is the person present at the meeting on the respondent's side and who is alleged to be responsible for subjecting the claimant to detriments. When it is one person's word against another's, and I am obliged to take the word of the claimant at its reasonable highest, and where the claimant is not alleging anything inherently very implausible, I cannot possibly be satisfied that there are no or little reasonable prospects of success of the Tribunal deciding at trial that what she says happened actually happened. It is unarguable that I could possibly do that; I would be making an error of law if I did so.
12. If there were some contemporaneous documentation the situation might be different. For example, if this meeting had been minuted and those minutes had been signed by the claimant as complete and accurate and flatly contradicted her allegations, that might be a case where one could say there was little reasonable prospects of success, because of the strength of the documentary evidence supporting the respondent. But there is nothing like that here.
13. The claimant's main allegation is that her job was threatened at the meeting, because she had blown the whistle. She alleges she was told (using the words she uses in her further and better particulars), "*He said my job was not safe or guaranteed and that I would have to be re-interviewed for a position*". On the face of it, that is an explicit threat. I appreciate that the respondent's case will be that any remark along those lines was entirely reasonable in its context, that it was not said in a threatening way, and that there are various good reasons why what was said was said. That is all, though, a matter for trial. Mr Shaw's alleged remark is manifestly capable of being a detriment. I cannot say there is no or little prospect of the Tribunal at the final hearing deciding that: the remark was not made; the remark was not a detriment; the remark was not made because the claimant blew the whistle.
14. There are other aspects to this complaint and to what allegedly happened at this meeting, but that is the key one. There is no proper basis to strike it out or make a deposit order in respect of it. If that complaint proceeds then potentially all of the other complaints are in time. I will now go on to deal with those other complaints, to the extent that Mr Morris wants me to.

*[In light of the above decision, the respondent did not proceed with any other strike out or deposit order or other application in relation to the claimant's other complaints.]*

EMPLOYMENT JUDGE CAMP

03 January 2021

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FOR THE TRIBUNAL OFFICE