



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Peter Graham

Respondent: Chief Constable of Cleveland Police

Heard at: Newcastle upon Tyne Hearing Centre

On: Friday 12th Feb. and Wednesday 3rd March 2021

PUBLIC PRELIMINARY HEARING BY CVP

Before: Employment Judge Johnson

Representation:

Claimant: Mr E Gold of Counsel

Respondent: Mr A Webster of Counsel

JUDGMENT

The claimant's application to strike out the response is refused.

REASONS

1. This matter came before this afternoon for further consideration of the claimant's application dated 25th January 2021, to strike out the response. The claimant was again represented by Mr Gold of Counsel and the respondent by Mr Webster of Counsel.
2. The claimant is a serving police officer in the Cleveland police force and currently has the rank of police inspector. By a claim form presented on 12th March 2020, he brought complaints of unlawful disability discrimination, alleging that he has been denied the opportunity to act up as Acting Chief Inspector, to perform the role of Temporary Chief Inspector and/or to be promoted to the rank of Chief Inspector. The claimant alleges that denial of these opportunities amounts to direct discrimination because of his disability, unfavourable treatment because of something arising in consequence of his disability and indirect discrimination contrary to Section 19 of the Equality Act 2010, because there is a requirement for

those persons appointed to the rank of Chief Inspector to be able to perform arrest, restraint and/or full officer safety training.

3. All allegations are denied by the respondent. The respondent presented its response on 10th June 2020, in which no admission was made as to whether the claimant's physical impairment amounted to a disability and the allegations of unlawful disability discrimination were denied.
4. Following a case management hearing before Employment Judge Garnon on 23rd June 2020, the respondent was given permission to file an amended response, which was presented on 27th August 2020. Disability was still not admitted. The allegations of unlawful disability discrimination were denied.
5. At that case management hearing, standard case management orders were made including those for disclosure and inspection of documents, preparation of the final hearing bundle and exchange of witness statements. A timetable was agreed for the implementation of those steps. By notice dated 5th August 2020, the parties were informed that the final Hearing in these proceedings would take place over 4 days from Monday 22nd March 2021 to Thursday 25th March 2021 inclusive.
6. On 25th January 2021 solicitors instructed by the claimant lodged a formal application to strike out the response on the following grounds:-
 - (i) the respondent has failed to admit or deny the claimant's case on disability and/or has no prospect of success of disputing the same;
 - (ii) the respondent has failed to aver any positive case and accordingly his defence has no prospect of success;
 - (iii) the respondent has substantially failed in his obligation to give disclosure of documents, amounting to inter alia a breach of the rules of procedure, a breach of procedural fairness and an abuse of the process of the tribunal.

That application was listed for a hearing by CVP on the afternoon of Friday 12th February 2021 with a time estimate of 3 hours. On 11th February (the day before the preliminary hearing) the respondent formerly conceded that the claimant is suffering from a disability as defined in Section 6 of the Equality Act with effect from the 10th November 2015 and that the respondent knew of that disability from 10th November 2015. At the hearing on 12th February, Mr Gold for the claimant accepted that the first ground of his application to strike out the response had effectively fallen away because of that concession.

7. Following the submissions of both Mr Gold and Mr Webster at that hearing, an Order was made requiring the respondent to send to the claimant on form N265 (of the Civil Procedure Rules) a list of documents by way of standard disclosure, containing a statement of truth signed by the Chief Constable, Mr Richard Lewis. The remainder of the claimant's application to strike out the response was postponed until today.

8. The list of documents on form N265 was completed by the respondent's solicitors and signed by the Chief Constable on 26th February 2021 and then sent to the claimant's solicitors.
9. At today's hearing, Mr Gold again took me through his application to strike out, supported by a statement from his instructing solicitor, Mr Bennett, a statement from the claimant himself and Mr Gold's written submissions on the respondent's disclosure statement, which submissions are dated 1st March 2021.
10. In simple terms, Mr Gold submits that the respondent remains in breach of its duty of disclosure and that completion of the form N265 and its execution by the Chief Constable himself, does not satisfy that obligation. In particular, Mr Gold makes reference to the paucity of documentation disclosed by the respondent and insists that there must be other documents in the respondent's possession which are relevant to the issues to be decided in this case. At paragraph 19 of his submissions, Mr Gold states as follows:-

"The respondent maintains that there are only 15 relevant e-mails in relation to on-going failures over 3 years. There remains, therefore:-

- (i) not one document or record of any of the meetings that the claimant had with senior officers concerning the failure to promote him;
- (ii) not one e-mail document or record of any single step that Superintendent Jackson or any other senior officer took with respect to supporting the claimant to be appointed to a temporary chief inspector role or the response of any such steps;
- (iii) not one e-mail, document or record of any discussion or meeting in which the claimant was discussed with respect to a temporary chief inspector role and why he was not appointed and/or why others were appointed;
- (iv) not one e-mail, document or record showing any consideration of the claimant for the role of temporary chief inspector of the control room or of community safety;
- (v) not one document as to why officers other than the claimant were permitted to occupy or were selected for temporary chief inspector roles for substantial periods of time, in excess of periods of one year, two years and three years;
- (vi) not one document as to why the claimant was not appointed a chief inspector at the promotion board in December 2019."

Mr Gold concludes at paragraph 20:-

"The tribunal can have no confidence in the respondent's disclosure process, which still remains incomplete. Accordingly, the respondent's claim falls to be struck out."

11. Mr Gold identified that the form N265 signed by the Chief Constable states as follows:-

“This disclosure statement is made by Richard Lewis in my capacity as the Chief Constable of Cleveland Police. I make this statement on reliance on information/searches carried out by my Legal Services unit.”

Mr Gold in his submission referred to the case of **Hedrich v Standard Bank London Limited** [2008 EWCA-CIV-905] which states that a solicitors duty is to investigate the position carefully and to ensure so far as possible that full and proper disclosure of all relevant documents is made. This duty, owed to the court, is one upon which the administration of justice very greatly depends. The solicitors duty extends to explaining to his client the existence and precise scope of the disclosure obligation and the need to preserve documents.

12. Mr Gold drew my attention to that part of the form N265 which states that, “The respondent no longer has under its control, documentation relating to the claimant’s application for the role of Chief Inspector in the promotion process in November 2019. The physical documentation for unsuccessful applications such as the claimant is held for a period of 6 months only following which it is destroyed. It is understood that the claimant’s application form is available in electronic form and this has been requested. Further enquiries will also be undertaken to try and trace any other documentation regarding the Chief Inspector promotion process which may exist in electronic form.” Mr Gold pointed out that the promotion board process was undertaken in November 2019 and the claimant was informed in December 2019 that he had been unsuccessful. His claim form was presented on 12th March 2020, which is well within the 6-month period referred to by the respondent. No meaningful explanation has been given by the respondent as to why those documents have been destroyed.
13. Mr Gold submitted that in the Orders made on 12th February 2021, it states at paragraph 2 (in respect of the order for disclosure on form N265) the following:-

“Unless the respondent complies with the orders set out in 1 above, then the response shall be struck out without further judgment or order.”
14. Mr Gold submitted that the respondent was in fact in breach of that “unless” order and that the response was thereby struck out.
15. Mr Gold submitted that there must be other documents relating to allegations raised by the claimant. Those documents would include officers` pocket books, day books, diary entries, appointment criteria, interview notes and assessment scores given to those who applied for the various positions. None of those have been disclosed.
16. Mr Gold drew my attention to a decision of the Investigatory Powers Tribunal in **Dias and Others v Chief Constable of Cleveland Police** 2017 when the tribunal referred to a disclosure failure by the respondent as being a matter of concern, holding that:-

- (i) the respondent's behaviour casts doubt on whether the respondent has disclosed all the CDA which were granted and whether the tribunal has been misled;
- (ii) the respondent failed to comply with its disclosure obligations to the tribunal until after the first judgment;
- (iii) the suspicion which attaches to the respondent's conduct of the proceedings is soundly based, given the disclosure failures and the deeply unsatisfactory series of events described in the first judgment;
- (iv) the respondent sought to resist disclosure of documents, presumably hoping that the tribunal would arrive at a false conclusion as to the facts."

Mr Gold also drew my attention to a decision at this tribunal in the case of **Sadique v Chief Constable of Cleveland Police** [2015] where the tribunal found that, "The only documentation disclosed late to us contradicted what had been asserted, observing of the evidence that the Head of Legal Services replied that all matters had been properly dealt with. What else would she say?"

Mr Gold's submission was that the difficulties encountered by the claimant in the current case were similar to those encountered by other litigants in different proceedings against this respondent. Mr Gold again drew my attention to the destruction of the 2019 promotion board documents and invited me to conclude that the respondent is deliberately withholding documentation or has destroyed documents which would adversely affect its case.

17. Mr Gold then spent some time taking me through the respondent's first grounds of resistance and its amended grounds of resistance. Mr Gold pointed out that the concession on disability had been made at the last possible moment. Mr Gold pointed out that nowhere in the amended grounds of resistance is there any positive case asserted by the respondent by way of an explanation as to why the claimant was not appointed to act as Chief Inspector, or to be a temporary Chief Inspector or to be promoted to the rank of Chief Inspector. Mr Gold pointed out that in the first grounds of resistance, denials were made on behalf of those senior officers when the claimant alleged had informed him that he was suitable for promotion. In the amended grounds of resistance, those senior officers now say that, whilst they cannot specifically remember any such discussions, it is possible that those discussions took place. All the respondent states is that with regard to the 2019 promotion board, "Those that did not pass the interview stage failed to present the evidence that there had in such a way as to convince the panel they met the required standards." The respondent also denies that it applied any PCP that persons appointed to the rank of Chief Inspector be able to perform arrest, restraint and/or full officer safety training. It goes on however to state that, "further or alternatively any such PCP was a proportionate means of achieving a legitimate aim." Nothing is said about what was the aim, how it was legitimate or how applying the PCP was proportionate.
18. Mr Gold's submission was that, even at this late stage, the claimant has no idea as to what will be the respondent's case. He therefore cannot fairly and properly prepare his own witness statement, in which he must set out his own case and respond to that put forward by the respondent. Mr Gold submitted that there

cannot therefore be a fair trial of the issues between the claimant and the respondent.

19. Mr Webster for the respondent submitted that the respondent has complied with its obligations in respect of disclosure of documents. The appropriate searches have been carried out and the claimant has been informed as to the nature of those searches. The claimant's concerns about the alleged failure to disclose documents were aired at the hearing in February, when the tribunal considered that the requirement to serve form N265 personally signed by the Chief Constable would be sufficient to ensure that the respondent undertook the appropriate searches before that document was signed by the Chief Constable himself. Mr Webster acknowledged the claimant's concerns about the destruction of the documents relating to the 2019 promotion board, but stated that, if the documents no longer exist, then they cannot be disclosed. Mr Webster pointed out that the claimant had not raised any formal grievance in writing in respect of those matters about which he now complains to the tribunal. Had he done so, then there would have been a paper trail relating to those matters. Mr Webster pointed out that much of what the claimant alleges was contained in verbal discussions between himself and senior officers. If those senior officers did not keep any records of those discussions, then those records cannot be disclosed. Mr Webster submitted that the respondent had complied with its disclosure obligations and further had complied with the Order made by the tribunal on 12th February 2021. The "unless" order had been complied with and accordingly the claims had not been struck out. Furthermore, they should not be struck out at this stage.
20. Mr Webster pointed out that the respondent's pleaded case contains time points, to the effect that the tribunal does not have jurisdiction to hear some of the claimant's complaints which occurred more than 3 months before the presentation of the claim form. Furthermore, there are factual disputes, particularly where the respondent's witnesses have no recollection of those discussions which the claimant maintains did take place.
21. Mr Webster went on to state that this matter is listed for a full hearing on 22nd March and that it would not be in the interests of justice for the response to be struck out at this late stage when all the disputed matters can be put before a full tribunal. Mr Webster also pointed out that the claimant's schedule of loss amounts to a sum in excess of £500,000 and that it would be contrary to the interests of justice for there to be a summary liability judgment, which may produce an order for compensation of that magnitude.
22. The provisions relating to the striking out of a case or response are contained in Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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 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
 - (d) that it has not been actively pursued
 - (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).
- (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above.
23. The claimant submits that the respondent is in breach of its obligation to disclose documents which are relevant to the issues in dispute and which are necessary for fairly disposing of the proceedings. The purpose of the general rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of documents not being produced for inspection. The obligation includes one to make a reasonable search for relevant documents. The overriding objective requires the party to litigation to co-operate with each other and with the tribunal. As soon as the prospect of litigation is raised, the parties have a duty to preserve those documents which may be required for standard disclosure. It is accepted that it is the duty of a solicitor, as an officer of the court, to inform his or her client accordingly. By the time the claim form and response form have been presented, it should be possible (if necessary at the preliminary hearing) to properly identify the claims and the issues which arise from those claims. Once that is done, the appropriate steps for standard disclosure should be implemented.
24. In his strike out application, the claimant alleges that the respondent has failed to comply with those obligations – namely to carry out a reasonable search and then to disclose the relevant documents. The respondent’s case is that it has carried out that search and has disclosed the relevant documents. I pointed out to Mr Gold that at no stage has the claimant made an application to the tribunal for an order for specific disclosure. The claimant could have set out those documents which he says did or should exist and required an explanation as to their non-disclosure. In my judgment that could and should have been done before an application was made to strike out on the grounds of non-disclosure. I am satisfied that the respondent has complied with the “Unless Order” made on 12th February 2021. The respondent has prepared the appropriate N265 document, had it signed by the Chief Constable personally and submitted it to the claimant’s solicitors.
25. I acknowledged the claimant’s genuine concerns about the paucity of documents which have been disclosed by the respondent. Those concerns

can be put to the respondent's witnesses at the final hearing. The claimant is entitled to an explanation from those witnesses as to the lack of documents which have been disclosed. Explanations may be sought from those witnesses as to why records were not made and/or kept, and why records, which may have been made, were subsequently destroyed. I am not satisfied that the alleged failure to comply with the disclosure obligations in this case means that there cannot be a fair trial or the issues between the parties which will produce a just outcome.

26. The power for tribunals to strike out a claim or response on the ground that it has no reasonable prospect of success requires the tribunal to form a view on the merits of the case and only where the tribunal is satisfied that the claim or response has no reasonable prospect of succeeding, should the strike out power be exercised. That is particularly so in fact sensitive discrimination cases. In **Anyanwu v South Bank Student Union** [2001 ICR391] the House of Lords highlighted the importance of not striking out discrimination claims, except in the most obvious cases, as they are generally fact sensitive and require full examination to make a proper determination. It is well known that it is unfair to strike out a claim or response where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be fully considered before a full tribunal. Before determining whether a discrimination claim (or response) has no reasonable prospect of success, it is necessary to take the claimant's (or respondent's) case "at its highest". This means examining the pleaded facts for the purposes of the strike out consideration, assuming (unless there is a compelling reason not to) that the claimant's (or respondent's) version of any key disputed facts is correct. However, in **Ahir v British Airways Plc** [2017 EWCA-1392] the Court of Appeal said that the tribunal should not be deterred from striking out even discrimination claims that involve disputes of facts, if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2018 EWCA-CIV-978] the Court of Appeal said that, "whether striking out is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed."
27. The drastic nature of the power to strike out justifies caution in its exercise. The tribunal has a discretion to strike out and is not required automatically to do so merely because it does determine that the claim (or response) has no reasonable prospect of success. It must also consider whether it is just to proceed to strike out in all the circumstances, rather than allowing the case to proceed to a full hearing or taking less draconian steps to elucidate the nature of the claim or response. His Honour Judge Shanks in **Parkin v Leeds City Council** [UKEAT/0178/19] observed even where a case has been poorly pleaded, but it is possible to discern matters that might constitute proper claims or grounds of defence, "the best answer may be to just list them for a full hearing at the earliest opportunity and not keep making interim orders that are appealed. That way the parties are able to give evidence, tell their full

story, facts are decided upon and the results of those can be adjudicated upon.”

28. I am not satisfied that there cannot be a fair trial of the issues between these parties which will produce a just outcome. Solicitors on both sides have agreed that witness statements can be prepared and exchanged in accordance with the Orders made on 13th February in respect of a hearing which is due to take place in less than 3 weeks' time. I see no reason why the points raised in submission by Mr Gold cannot be put to the respondent's witnesses in cross-examination and then in closing submissions. It remains for the claimant to prove facts from which, in the absence of an explanation from the respondent, it could decide that there has been a contravention of the Equality Act 2010. It is for the respondent to provide an explanation once those facts have been established. Mr Gold's submission is that there can be no explanation because there is no such explanation in the respondent's pleaded case. In my judgment, there is sufficient in the amended response to entitle the respondent's witnesses to put forward their explanation. All the points raised by Mr Gold before me in this justification can be properly put to the respondent's witnesses. If the respondent's case is taken "at its highest", then it cannot be said to have no reasonable prospect of success.
29. For those reasons the claimant's application to strike out the response is refused.

G Johnson

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

05 March 2021

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