



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106994/2019 & 4114955/2019

Held in Glasgow on 18 August 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 to confirm its Judgment dated 19 March 2020.

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 were combined in terms of an Order dated 31 January 2020. The claims contain a number of different complaints under the Employment Rights Act 1996 (“ERA”) and the Equality Act 2010 (“EA”). All claims are resisted. On 10 June 2020 the claimant presented a further claim, Case number 4103297/2020.

2. The respondent sought strike out of (i) the claims brought under Section 47B of ERA (detriment for making a protected disclosure) in terms of Rule 37(1)(e) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 and/or because the claims are *res judicata* and (ii) strike out of the claim under Section 27 of EA (victimisation) in terms of rule 37(1)(e) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (“Rules of Procedure 2013”). The respondent’s applications for strike out were refused by the Tribunal in terms of its Judgment dated 19 March 2020 (“the Judgment”).
3. The respondent sought reconsideration of the Judgment. The application was not refused by the Employment Judge under Rule 71(1) of the Rules of Procedure 2013. The claimant objected to the application for reconsideration. A hearing was not considered necessary in the interests of justice. Parties were given a reasonable opportunity to make further written representations. Written representations were made by Dr A Gibson, Solicitor for the respondent and by Mr J Meechan, Solicitor for the claimant.

Submissions

Respondent’s submissions

4. The respondent provided the Tribunal with written submissions on 27 March 2020. Referring to paragraph 23 of the Judgment, Dr Gibson submitted that when deciding not to strike out the claim under Rule 37(1)(e) of the Rules of Procedure 2013, the Tribunal had failed to attach sufficient weight to the difficulties caused to the respondent by the passage of time. The claimant, submitted Dr Gibson, can “*effectively make up whatever she likes*” about her purported protected disclosure. By contrast, submitted Dr Gibson, the respondent will not have the recall, paperwork or knowledge to adequately challenge the claimant’s evidence. The Tribunal, submitted Dr Gibson, is effectively placing significant weight on a “*very spurious position*” that because the respondent will be allowed the opportunity to do what he described as “*virtually impossible*” given the passage of time, no prejudice will be caused to them. This is inherently unfair, submitted Dr Gibson and contrary to the interests of justice.

5. Likewise, submitted Dr Gibson, the Tribunal when assessing prejudice to the parties has failed to attach sufficient weight to the adverse effect of the passage of time on the ability of the respondent's witnesses to recall events. A witness's ability to attend a hearing to give evidence is in no way the same, submitted Dr Gibson, as being able to give credible and reliable evidence some 12 years after the fact. The Tribunal, submitted Dr Gibson, is effectively saying that there is no prejudice caused to the respondent by the passage of time if they are able to call a retired Police Officer to speak to what occurred in 2008.
6. In relation to the decision not to strike out the claim as being *res judicata*, Dr Gibson submitted that the Tribunal's observation at paragraph 36 of the Judgment that there was "*no determination (in the original claim) of whether the claimant had made a protected disclosure*", is incorrect in both fact and law. There is nothing, submitted Dr Gibson, in respect of the doctrine of *res judicata* and *cause estoppel* which says that the matter has to be determined following the hearing of evidence. For the claimant to be permitted to rely on the same protected disclosure to pursue a further claim, submitted Dr Gibson, prevents finality of proceedings. Dr Gibson questioned whether the claimant should be allowed to raise claim after claim relying on the same protected disclosure because earlier claims were withdrawn before the question was put to evidence. This is contrary to the principle of *res judicata*, submitted Dr Gibson, and could amount to harassment of the respondent.
7. It is in the interests of justice, submitted Dr Gibson, that the Tribunal reconsider the Judgment refusing the respondent's application for strike out of the claims. The Judgment should be taken again, submitted Dr Gibson, upholding the application for strike out.

Claimant's submissions

8. The claimant provided the Tribunal with written submissions on 20 April 2020. In response to the application for reconsideration, Mr Meechan submitted that there was nothing in the application of any substance that was new or that was not submitted previously in support of the application. It would not be in the interests of justice, submitted Mr Meechan to reconsider and revoke the Judgment.

9. There is no issue of witness availability or lack of documentary evidence, submitted Mr Meechan and any suggestion that the claimant may struggle to give evidence is refuted. The claimant, submitted Mr Meechan, should be allowed the opportunity to put her claims and evidence to the respondent at a final hearing. It would be unjust and contrary to the overriding objective, submitted Mr Meechan, to strike out the claims and prevent them from proceeding to a final hearing on the claimant's allegations of detrimental treatment for whistleblowing.
10. The claimant, submitted Mr Meechan, would be significantly prejudiced if the Judgment is revoked and the claims struck out. She would be unable to pursue a remedy in circumstances where she is able and willing to give oral evidence at a final hearing and in circumstances where she has documentary evidence which has been disclosed to the respondent. It is in the interests of justice, submitted Mr Meechan that the evidence is considered and the issue determined at a final hearing in respect of the claimant's whistleblowing detriment claim. Mr Meechan submitted that strike out is a draconian measure that should be exercised lightly, particularly in relation to discrimination and whistleblowing claims.
11. The application for reconsideration, submitted Mr Meechan, is causing additional delay and expense and should be refused.

Discussion and deliberation

12. In terms of Rule 70 of the Rules of Procedure 2013 a Tribunal may on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision may be confirmed, varied or revoked. If it is revoked, it may be taken again.
13. The respondent's application for reconsideration of the Judgment was not refused under Rule 72(1) of the Rules of Procedure 2013 on the grounds that there was no reasonable prospect of the original decision being varied or revoked. Consideration was given by the Tribunal to written representations made by the parties.

14. It is the respondent's position that the Tribunal, when deciding whether the claims should be struck out, did not attach sufficient weight to the adverse effect that the passage of time will have on their ability to challenge the claimant's evidence. The prejudice caused to a party by the passage of time was a factor identified by the respondent in support of their application for strike out of the claims. It is a factor that was considered by the Tribunal and to which weight was attached when deciding whether a fair hearing remained possible. The Tribunal was not persuaded that in all the circumstances the prejudice caused to the respondent by the passage of time since the protected disclosure is said to have been made outweighs the prejudice to the claimant of striking out the claims. The onus is on the claimant to prove that she made a protected disclosure. The claimant seeks to rely in part on documentation dating from the time of the alleged disclosure, copies of which have been provided to the respondent. The person to whom the protected disclosure is said to have been made can be called by the respondent to give evidence. The inevitable difficulties caused by the passage of time were taken into account by the Tribunal, as were the other factors identified in the Judgment, when deciding whether a fair hearing remained possible. The respondent has not identified any additional factors in their application for reconsideration that persuade the Tribunal that it is no longer possible to have a fair hearing and that it should revoke its Judgment refusing the application and strike out the claims under Rule 37(1)(e) of the Rules of Procedure 2013.
15. In terms of the application to strike out the claims as being *res judicata*, the Tribunal did not proceed on the basis that for the principle to apply it is necessary for the matters in dispute to have been determined following the hearing of evidence. The fact that the original claim was withdrawn before any determination was made on whether the claimant made a protected disclosure was a factor taken into account by the Tribunal but was not determinative of the issue. The Tribunal considered a number of other factors that are identified in its reasons for deciding that the claims should not be struck out as being *res judicata*, including the fact that the cause of action raises entirely different alleged detriments.

Conclusion

16. In all the circumstances, the Tribunal having reconsidered its Judgment dated 19 March 2020, is not persuaded that it should be varied or revoked and accordingly the Judgment is confirmed.

Employment Judge: F Eccles
Date of Judgment: 18 August 2020
Entered in register: 27 August 2020
and copied to parties