EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112618/2018

Held in Edinburgh on 4th December 2020

Employment Judge Porter

Mrs R Malone	**Claimant** **Represented by** **Ms M Gribbon – Solicitor**
Police Service of Scotland	**Respondents** **Represented by** **Mr Healey – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal to allow the claimant's amendment as set out in paragraph 55 of her consolidated pleadings. The claimant's applications for Strike Out and/or the making of a Deposit Order under Rules 37 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations Schedule 1 are refused.

Introduction

1. In these proceedings the claimant claims sex discrimination. Her claims include claims of direct sex discrimination under s13 of The Equality Act 2010, harassment and victimisation under s26 and s27 of that Act and detriment on

the ground that she made protected disclosures under section 47B of The Employment Rights Act 1996.

2. On the 4th of December 2020 there was a Preliminary Hearing ("PH") to discuss an outstanding application to amend on the part of the claimant, together with an application by the claimant for Strike Out under Rule 37 and the making of a Deposit Order under Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules"). To this end, the Notice of Hearing of the 9th November 2020 for this PH specified only the issues of Amendment and Strike Out; however, with the consent of Mr Healey the Tribunal also heard argument on the making of a Deposit Order.

3. At the outset of the PH Ms Gribbon moved to amend in terms of an amendment dated 25th August 2020 to incorporate claims of alleged victimisation by the respondents in their handling of the claimant's Ill Health Retirement ("IHR") and Injury On Duty ("IOD") applications. The respondents did not oppose this amendment (and indeed had already responded to it in their pleadings) and the amendment was allowed. The amendment formed the basis of the claimant's application for Strike Out/or the making of a Deposit Order under Rules 37 and 39.

4. The parties produced a Joint Bundle of Documentation numbered **1** to **152**. The Bundle included consolidated pleadings produced by both the claimant and the respondents, which were of great assistance to the Tribunal in determining the issues at large at the PH.

5. The Tribunal had the benefit of a detailed Note of Argument prepared by the claimant's solicitor Ms Gribbon, which was taken as read. In that Note of Argument the claimant identified three pieces of correspondence recovered under a SAR application which were founded upon by the claimant in support of her application for Strike Out/Deposit Order. These documents were included in the Joint Bundle and comprise firstly, an email from Alasdair Muir, senior HR business partner to others dated the 16th December 2019 (**111**); an email to Alasdair Muir from David Pettigrew, Police Superintendent dated the

17th December 2019 (**112**); and an email exchange between the claimant and Optima Health of 24th and 25th February 2020 (**136 to 137**).

6. At the PH the Tribunal heard evidence from Claire Pender an in-house solicitor with the respondents. Despite extensive cross examination, the Tribunal found the evidence of Claire Pender to be of limited value in circumstances where Claire Pender was neither the author nor a recipient of the three emails named by the claimant in the Note of Argument. In these circumstances the Tribunal declined to make any Findings in Fact from the evidence of Claire Pender. There was no cogent explanation given as to why Claire Pender and not Alasdair Muir (being the author and recipient of relevant emails) was called to give evidence.

7. The Tribunal heard the parties' submissions on the issue of Strike Out and thereafter heard their submissions on the issue of Amendment.

STRIKE OUT/ DEPOSIT ORDER

The undernoted is a brief summary of both parties' able submissions on the issue of Strike Out/ the making of a Deposit Order under Rule 37 and 39 of the Rules.

The claimant's submissions

8. The claimant submitted that the respondents' response to the claimant's victimisation claim in respect of the respondents' handling of the claimant's IHR and IOD applications has no reasonable prospects of success in terms of Rule 37(1)(a) of the Rules. To this end, the claimant highlighted that the HR professionals dealing with the claimant's application for IHR knew or ought to have known that all IHR applications are governed by the respondents' 2007 Regulations governing ill-health retirement and an IHR/IOD Standard Operating Procedure ("SOP") which is to be found at pages **96.1 to 96.19** of the bundle. The claimant also referred to the process map to be found at **96.18** in respect of ill health retiral and injury on duty applications.

9. In essence the claimant submitted that once there is a medical report concluding that a police officer is permanently disabled in accordance with the 2007 Regulations and the SOP there should be no delay in progressing an ill health retirement application to the Scottish Police Authority for a final decision. It was submitted that the claimant obtained a report from Dr Watt which was conclusive in its terms on the issue of her disability. Reference was made to the email sent by Alasdair Muir of 16th December 2019 in which he stated that the Postings Panel "*did not make a decision due to Employment Tribunal proceedings pending which we felt merited caution*" (**111**), despite the Postings Panel being in receipt of the report by Dr Watt. Likewise, David Pettigrew emailed Alasdair Muir on the 17 December 2020 **(112)** and stated "*I think it was important for us as a group to get clarification on this matter as it would be catastrophic if progressing the ROIH (ill health retirement application) adversely affected the outcome of the ET.*"

10. Against this background the claimant submitted that the respondents' failure to progress the claimant's IHR application in accordance with the 2007 Regulations and the IHR SOP was mainly or wholly because of the protected act made by the claimant, namely the issuing of these proceedings.

11. In support of her submissions the claimant made reference to the cases of **Nagarajan v LRT** (1999) IRLR 572; **Tayside Public Transport Company Limited v Riley** (2012) IRLR 755; **Ahir v BA Plc** (2017) EWCA Civ 1392; and **Shestak v RCN and others** UKEAT/0270/08. The claimant distinguished the case of **Chief Constable of West Yorkshire Police v Khan** (2001) IRLR 830 on the grounds that the claimant's IHR application did not have the potential to impact on the proceedings in the same way as Mr Khan's employment reference may have done in that case.

12. The claimant also applied for strike out under Rule 37(1)(b) in that she submitted that the manner in which the proceedings have been conducted by or on behalf of the respondents has been unreasonable. To this end it was submitted that there are two cardinal conditions in the exercise of power under

this Rule. These are that the unreasonable conduct takes the form of either deliberate and persistent disregard of required procedural steps or it has made a fair trial impossible **Blockbuster Entertainment Limited v James** (2006) IRLR 630.

13. The claimant submitted that the respondents have deliberately misled the Employment Tribunal and the claimant's solicitors over several months in relation to the progress of her IHR application. In this respect, the claimant referred to a letter of 12th December 2019 from Aileen Irvine of Clyde & Co to the Edinburgh ET **(60-61)** in which it was stated: "*The IHR process is entirely independent of the Employment Tribunal's proceedings. The respondent strongly refutes any suggestion that the respondents are engaging in tactics to delay the process of the ongoing claim.*" The claimant submitted that the correspondence recovered under her SAR request revealed that this was not the case.

14. The claimant submitted that the main witness for the respondents in the IHR victimisation claim will be Alasdair Muir and submitted that the documentary evidence provided and referred to is irrefutable evidence that Alasdair Muir, a senior HR professional with the respondents, knowingly misled the claimant's solicitors and that those misleading assertions claims were then repeated to the ET and the claimant's solicitor as reflected in the correspondence of 12th December 2019.

15. In support of the application for strike out under Rule 37(1)(b) the claimant cited the case of **Sud v Mayor and Burgess of the London Borough of Houndslow and another** EAT 0182/2014.

16. Finally, the claimant submitted that in considering the application for strike out under Rule 37(1)(b) the Tribunal should consider the identity of the respondents, being the second largest police service in the UK and being a large and well-resourced organisation funded by the taxpayer.

17. The claimant submitted that she relied upon the same submissions made in Strike Out in seeking a Deposit Order under Rule 39 of the Rules. To this end, the Tribunal observed that there was no dispute that the respondents will be in a position to pay a Deposit Order.

For the Respondents

18. The respondents submitted at the outset of their submissions that in the amendment of 25th August 2020 allowed by this Tribunal the claimant's case was that the victimisation alleged consisted of delay in processing her IHR and IOD applications. Mr Healey submitted that at no point in that amendment does the claimant state that she was victimised due to the respondents' failure to comply with the 2007 Regulations and the IHR/IOD SOP. He submitted that the claimant's case set out in the amendment is **only** that she was victimised due to delay on the part of the respondents in the processing of her IHR and IOD applications. Mr Healey submitted that the respondents would have responded to the amendment differently had there been fair notice of a case of failure to comply with the 2007 Regulations and the IHR/IOD SOP.

19. In these circumstances Mr Healey submitted that the respondents have no fair notice of the case in respect of which the claimant seek to strike out their response under Rule 37(1)(a).

20. Separately and generally, Mr Healey submitted that evidence requires to be led in respect of the relevant correspondence as the Tribunal requires the benefit of such evidence before understanding the meaning of such correspondence. In the same vein Dr Watt's report, relied on by the claimant as being conclusive in its terms, was neither produced nor agreed in these proceedings.

21. Mr Healey highlighted the case of **Mechkarov v Citibank N.A** UKEAT/0041/16, in particular paragraph 14 thereof and **Balls v Downham Market High School and College** UKEAT/0343/10.

22. In all of these circumstances Mr Healey submitted that this case should not be struck out, nor should a deposit order be granted.

23. In response to the respondent's submissions Ms Gribbon submitted that compliance with the respondent's 2007 Regulations and SOPs were implied in their processing of the claimant's IHR and IOD applications.

Strike Out – The Law

24. Rule 37 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 provides:

> "*(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 it is scandalous or vexatious or has no reasonable prospects 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;*"

25. In determining whether a case has no reasonable prospect of success the Tribunal had regard to the cases of **Tayside Public Transport Company Limited v Riley**, **Ahir v BA Plc** and **Shestak v RCN and others** cited by the claimant in support of her application for Strike Out.

26. As submitted by the respondents, the Tribunal considered that the EAT case of **Mechkarov v Citibank N.A** contains a concise statement by Mr Justice Mitting in respect of the law on strike out. At paragraph 14 it is stated :"*14 On the basis of those authorities the approach that should be taken in a strike out application in a discrimination case is as follows: (1) Only in the clearest case*

should a discrimination claim be struck out; (2) Where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence; (3) The claimant's (respondents) case must ordinarily be taken at its highest; (4) if the claimant's (respondents') case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents it may be struck out; and (5) A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

27. In determining the issue of strike out on the basis of no reasonable prospect of success, the Tribunal gave consideration to the Judgment of the Honourable Lady Smith in the case of **Balls v Downham Market High School and College** and in particular paragraph 6 thereof where it is stated: "*Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success the structure of the exercise that the Tribunal has to carry out is the same; the Tribunal must first consider whether on a careful consideration of all the available material they can properly conclude that the claim has **no** reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent and in the ET3 or in submissions and deciding whether they are written or oral assertions regarding dispute in matters are likely to be established as facts. It is in short a high test. There must be **no** reasonable prospects.*"

28. Insofar as the test under 37(b) is concerned, the Tribunal had regard to the authority of **Blockbuster Entertainment Limited v James** and the principles that for a Tribunal to strike out for unreasonable conduct it has to be satisfied either that the conduct involved deliberate and persistent regard of required procedural steps or has made a fair trial impossible. In either case the striking out must be a proportionate response.

Deposit-The Law

29. Rule 39 of the Rules states:

"*39 Deposit Orders*

(1) Where at a Preliminary Hearing 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 £1000 as a condition of continuing to advance that allegation or argument."

30. The Tribunal considered that the test "little prospects of success" is plainly not as rigorous as the test of "no reasonable prospects of success" and therefore a Tribunal has greater leeway when considering whether or not to order the granting of a deposit order. The Tribunal was of the view, however, that it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

Discussion and Decision –Strike Out

31. The Tribunal commenced its deliberations by giving consideration to the respondents' submissions that there was no fair notice in the pleadings of the claimant's essential arguments on strike out, succinctly summarised in para 33 of the claimant's Note of Argument. It is there stated: *"33 It is submitted that the respondents' failure to progress the claimant's IHR application in accordance with the 2007 Regulations and IHR/SOP was mainly or wholly because of the protected act. Furthermore, and over a lengthy period of time, the respondents deliberately misrepresented the position to the claimant's solicitor which not only caused the claimant mental and financial harm but resulted in her ET hearing being postponed."*

32. To this end, the Tribunal noted that in the amendment of 25th August 2020 allowed at the outset of these proceedings the claimant made reference to the relevant emails recovered under her SAR request and summarised the position by stating: "*The claimant submits that the emails referred to above are evidence that the respondent delayed progress of her IHR application because of the protected act and deliberately misrepresented the reasons for doing so*

to her and her solicitor. In addition it is alleged that the respondent also instructed their solicitor to provide information on this matter to the Employment Tribunal which they knew or ought to have known was untruthful. The claimant contends that the emails referred to indicate that contrary to the respondents' assertions the IHR application was not being dealt with independently of her ET claim." (para 87 of the consolidated pleadings)

33. At no point in the amendment does the claimant refer to the 2007 Regulations or the SOPs. In response the respondents state that "*The claimant's IHR application and IOD applications have been processed in the normal way and within normal timescales.*"

34. The Tribunal had regard to the submission by Ms Gribbon that compliance of the 2007 Regulations and the SOPs should be implied. However, without evidence, the Tribunal was unable to imply such a term as there is no factual or legal basis to do so. In this respect, the Tribunal had regard to the clear submissions of Mr Healey that the respondents had responded to the amendment on the basis that the detriment complained of was delay and not also failure to comply with the 2007 Regulations and the SOPs. The Tribunal also had regard to the submissions by Mr Healey that had he understood that the claimant's case was that the respondents failed to comply with the 2007 Regulations and the SOPs then the respondents would have responded differently to the amendment of the 25th August 2020.

35. The Tribunal considered that the absence of reference to the 2007 Regulations and the SOPs in the amendment of 25th August 2020 causes difficulty for the claimant in advancing her case of strike out is as there is no fair notice of these claims. Amendment is required if the claimant is to found on the failure of the respondents to comply with the 2007 Regulations and the relevant SOPs. The claimant's claim for strike out therefore must fail on this basis alone.

36. The Tribunal observed that at the heart of the question of detriment in the claimant's claim of victimisation in respect of failure to progress her IHR and IOD applications is the issue of delay. The Tribunal observed that there is no

agreement between the parties as to the extent of that delay, neither was there any evidence before the Tribunal in determining the extent of the delay. The Tribunal therefore concluded that they were in some difficulty in striking out the response to the claimant's claim of victimisation in respect of the respondents' handling of the claimant's IHR and IOD applications without evidence of what, if any, delays was occasioned as a result of their handling of such applications.

37. Further and in any event, in determining the claimant's application for strike out the Tribunal had in mind the words of Mr Justice Mitting in the case of **Mechkarov v Citibank N.A** that only in the clearest case should a discrimination claim (or response) be struck out and that where there are core issues of fact that turn to an extent on oral evidence they should not be decided without hearing oral evidence. The Tribunal considered these observations to be apposite to the facts of this case. To this end explanations may yet be forthcoming on the meaning of the correspondence recovered under the claimant's SAR request. The Tribunal also noted that the medical report of Dr Watt founded on by the claimant was not produced at the PH, nor were its terms agreed between parties.

38. In determining this issue the Tribunal had regard to the words of the Honourable Lady Smith in the case of **Balls v Downham Market High School and College** that the test of no reasonable prospects of success is a high test and there must be **no** reasonable prospects of success.

39. In refusing the claimant's application for Strike Out, the Tribunal also, of course, had regard to the claimant's claim of strike out in terms of Rule 37(1)(b). In this respect, the Tribunal considered that in order to determine whether or not the manner in which the proceedings have been conducted by or on behalf of the respondents has been unreasonable the Tribunal requires to hear evidence in explanation of the disputed correspondence by the authors or recipients of that correspondence. Without such evidence it is nigh on impossible for the Tribunal to reach the view that unreasonable conduct has taken place.

40. After having regard to all of the foregoing, it is the decision of the Tribunal to refuse the claimant's application for Strike Out. For the same reasons as articulated, the Tribunal considers that it is not at this stage able to make an assessment that there are little prospects of success in this case under Rule 39 and therefore also refuses the claimant's application for a Deposit Order.

41. In refusing the claimant's application for Strike Out and a Deposit Order, the Tribunal observes that explanation will be required from the respondents at the Hearing on Liability on the terms of the correspondence recovered under the claimant's SAR request and in particular the correspondence referred to by the claimant in her Note of Argument being the email from Alistair Muir dated 16th December 2019 (**111**) and the email from D Pettigrew to Alistair Muir, SPA and others dated 17th December 2019 (**112**). If a satisfactory explanation is not forthcoming at the Hearing, then the content of these and other emails may well form the basis of an application by the claimant to reverse the burden of proof in this aspect of the claimant's claim or, indeed, may well form an application for expenses at the conclusion of these proceedings.

Amendment

42. There is an outstanding amendment in this matter which is to be found in paragraph 55 of the claimant's consolidated pleadings. The amendment states: "*55 It is alleged that the respondents' refusal to treat the claimant's second grievance as a competent grievance and or the PSD's failure to investigate her complaints amount to direct discrimination and or victimisation and or harassment and or a section 47B detriment.*"

The undernoted is a brief summary of both parties' submissions on the issue of Amendment

43. The claimant submitted that this amendment is a category 1 amendment in terms of **Selkent Bus Company v Moore** 1996 IRLR 661 in that the

amendment does not advance new factual allegations which change the basis of the existing claim. The amendment should accordingly be allowed.

44. Separately, the claimant submitted that on the issue of delay the respondents have failed to respond voluntarily to routine requests for litigation, information and documents requests which resulted in any delay which was occasioned In any event it was submitted that this is not a case where the cogency of the evidence is likely to be affected. The claimant submitted that the claim was brought promptly once she knew of the facts relating to the basis of the claim.

45. Insofar as the timing and manner of the application is concerned the claimant submitted that no new date has been fixed for the final hearing and therefore no injustice or hardship will be faced by the respondents if the amendment is allowed.

46. For the respondents, Mr Healey submitted that the amendment should be refused as it introduces an entirely new case which comes out of time. To this end he relied upon the case of **Selkent** in stating that the amendment is out of time, comes late in the day and should therefore be refused.

47. On the all important issue of balance of prejudice, the respondents submitted that the amendment introduces yet more claims presented late in the day which the respondents will have to answer.

The Law - Amendment

48. In determining the issue of amendment the Tribunal was guided by the well-known case of **Selkent Bus Company v Moore** 1996 ICR 836 EAT. In **Selkent** the then President of EAT Mr Justice Mummery explained that relevant factors in allowing an amendment include the nature of the amendment, the applicability of time limits and the timing and manner of the application. In addition in determining the amendment a Tribunal must consider the balance of hardship and injustice to both parties.

Discussion and Decision - Amendment

49. The Tribunal considered the issue of amendment as articulated in paragraph 55 of the claimant's consolidated pleadings. Firstly, the Tribunal considered the terms of paragraph 54 of the claimant's consolidated pleadings which states: "*In late 2019 the claimant raised complaints with the PSD including a complaint about CIR's handling of her first grievance. In an email dated 28th November 2018 the respondents confirmed to the claimant that her complaints would be referred to the PSD. The claimant alleges that the PSD took no steps to investigate her complaints.*"

50. Against that background, the Tribunal considered that the nature of the amendment in paragraph 55 is a relabelling of facts already set out in paragraph 54 and the preceding paragraph and therefore it is irrelevant whether this amendment is brought within the time frame for these particular claims.

51. Further, even if the Tribunal is wrong on this, the Tribunal considers that there is force in the claimant's submissions that time should be extended on just and equitable grounds on the basis that the cogency of the evidence is unlikely to be affected, and the claimant brought the claim promptly once she knew of the facts giving rise to it. Additionally the Tribunal considered that insofar as the timing and manner of the application is concerned, the final hearing has yet to be fixed in this case and therefore there is time for the respondents to investigate and respond further to the claims within paragraph 55 should they consider it necessary to do so.

52. Finally, on the all important issue of balance of prejudice, the Tribunal considered that there would be more prejudice to the claimant were her claims within paragraph 55 not to be allowed then there would be for the respondents in responding to such claims which already form the basis of averments within the claimant's consolidated pleadings.

53. It is for all these reasons that the claimant's amendment in paragraph 55 of her consolidated pleadings is allowed.

54. This case will now be set down for a Hearing on Liability, to be heard in person. Date Listing Letters will be issued to list the Hearing. A PH will be listed in advance of the Hearing to discuss preparation for the Hearing.

Employment Judge: Jane Porter
Date of Judgment: 09 December 2020
Entered in register: 09 December 2020
and copied to parties