EMPLOYMENT TRIBUNALS

Claimant: Trevor Farley

Respondent: Sunderland City Council

PUBLIC PRELIMINARY HEARING

On: **17 January 2022**

Before: Employment Judge Sweeney

Appearances

For the Claimant, In person
For the Respondent, Stephen Forster, solicitor

JUDGMENT having been given to the parties on **17 January 2022** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Background and case management

1. The Claimant presented a Claim Form (ET1) to the Employment Tribunal on **21 November 2020**. The proceedings were listed for a preliminary hearing on **23 February 2021** before Employment Judge Martin. She observed that the claims were unclear and that substantial further information was required to understand them and the basis on which they were being pursued. She identified 'potential' claims and issues and gave directions for the Claimant to serve further information by **06 April 2021** (paragraphs 1.1 to 1.8 of her Orders). She identified that the Claimant 'appeared' to be making complaints under 10 legal headings, which she listed in paragraph 3 of her case management summary. It is clear that Judge Martin did her best to discern what the complaints might be and structured the questions in her case management summary for the benefit of the Claimant, the Respondent and the Tribunal.

2. The Claimant provided information in response to Judge Martin's orders. The matter then came before me at a further telephone preliminary hearing on **25**

May 2021. As I set out in paragraph 7 of the case management summary of that hearing:

"Mr Farley provided further information in response to those orders by way of a 22-page document. However, that information, rather than clarifying matters, only served to complicate matters further. I stressed that I was not being critical of Mr Farley. It is clear to me that he put a lot of work into producing that document. However, the document is not an easy read. I believe Mr Farley took on board what I was saying, which was intended to be constructive, with a view to 'knocking his claim into shape'. Whether his complaints are of any merit is for another day. The difficulty at the moment is understanding what they are. Having noted that he was complaining of age discrimination, I asked Mr Farley to tell me, in simple language what was the worst 'bad thing' he was complaining of, so that this could form the basis of a discussion as to how he should present his complaint in a coherent way."

3. The hearing in **May 2021** involved a wide-ranging discussion where I endeavoured to structure the actual things that the Claimant was complaining of, in a way that could be understood and placed within relevant statutory provisions. I set out an illustration of our discussion in paragraph 9 of the case management summary. In seeking to understand his complaints, I asked the Claimant to describe to me what his complaint was regarding volunteer work at the crematorium. I recorded the complaint in paragraph 10 of the case management summary. In asking him to explain what the detriment was, he explained that so long as he feels it is a detriment that is enough to show that it is or that he has been subjected to a disadvantage.

4. I encouraged the Claimant to put his case clearly and succinctly. In paragraph 13, I set out in writing what we had discussed at the hearing:

   "Rather than spread his net as wide as he can, he should concentrate on the real issues, the real complaints. At the moment he has adopted a shotgun approach, saying to me (for example) that Mr Scott wanted him removed because of his age, because of his disability, because of his sex, because of other things. If he persists in running a case which cannot be understood and which alleges every possible permutation of discrimination he can think of, he runs the risk, as I explained that parts of his complaint could be struck out or (I would add) a deposit order made."

5. At a further private preliminary hearing on **28 October 2021** there was another long discussion about the claims. By this time, Mr Farley had revised the complaints in a 12 page document dated **16 June 2021,** referred to as 'Revised Particulars of Claim' in which he referred to the complaints as being:

   5.1. Direct discrimination;
   5.2. Harassment;
   5.3. Failure to make reasonable adjustments;
   5.4. Equal pay;
   5.5. Unlawful deduction of wages

6. Those were the complaints that he was seeking to advance to a final hearing.

7. I directed that a public preliminary hearing be listed to consider whether the first three of the above should be struck out pursuant to rule 37(1)(a) (reasonable prospects of success) or whether a deposit order should be made and to determine a time point in relation to the fifth claim of unlawful deduction of wages. The complaint of equal pay was to be case managed separately.

8. The Respondent had prepared a bundle of documents for the purpose of the public preliminary hearing on **17 January 2022.** The structure and outcome of the hearing is set out in my case management summary and orders sent to the parties on **21 January 2022**.

9. The Claimant had prepared written representations in advance of the strike out hearing, in a 17-page document dated **02 December 2021**.Mr Farley confirmed at the outset of the hearing that this document also contained the witness evidence he intended to give on the out of time issue in relation to the claim of unlawful deductions (see pages 3-4 of that document). On page 16, the Claimant mentioned a number of statutory provisions, some of which had never been identified or discussed before and also referred to section 27 EqA 2010 (victimisation), which had not featured in his Revised Particulars of Claim.

Relevant Law

10. Rule 37(1)(a) ET Rules 2013 provides that all or any part of a claim or response may be struck out if, among other things, it has no reasonable prospect of success. This requires the tribunal to form a view on the merits of a case. Tribunals should be slow to strike out claims under this ground, recognizing that it is a draconian step. Particular care is required where cases are badly pleaded. The EAT has given guidance to tribunals in the case or **Cox v Adecco and others** [2021] I.C.R. 1307. The Claimant's case must ordinarily be taken at its highest. Many claims are expressed incoherently or at great length in such a way that it is difficult to discern what the actual acts complained of are, or where they sit within the statutory provisions relied on. It is not unusual in employment tribunal litigation for litigants, especially unrepresented litigants, to raise multiple complaints over many years.

11. It is not enough to say 'I don't understand what the complaint is'. Tribunals must make a reasonable attempt to identify the claims and the issues before considering whether to strike out. Where there is lack of clarity in what is pleaded, especially by litigants in person, the tribunal should strive to establish more precisely what the claimant is arguing, if necessary by making amendments which properly reflect those arguments.

12. In **Anyanwu v South Bank Student Union** [2001] I.C.R. 391, 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. The tribunal must consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success: **Balls v Downham Market High School and College** [2011] IRLR 217. It is, as the authorities make clear, a high test, which involves taking the claimant's case 'at its highest'. That means examining the pleaded facts and for the

purposes of the strike out consideration assuming, unless there is a completing reason not to, that the Claimant's version of events is correct.

13. In **Ahir v British Airways plc** [2017] EWCA Civ 1392, the Court of Appeal observed that tribunals should not be deterred from strike out even discrimination claims that involve disputes of fact 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. This was echoed by a further Court of Appeal decision in the case of **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] I.C.R. 1.

14. In **Chandhok v Tirkey** [2015] IRLR 195, Langstaff J observed at paras 19-20 that the cases in which a discrimination claim could be struck out before the full facts had been established are rare, giving examples of where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic.

15. In **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA, Mummery LJ said: "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent committed an unlawful act of discrimination."

16. The 'more' required need not be a great deal but there must ordinarily be 'something' more and the 'something' must usually be identifiable or discernible. Further, although not irrelevant to the issue of inference, the fact that a claimant has been subjected to unreasonable treatment, is not, of itself, normally sufficient to as a basis for an inference of discrimination as to cause the burden to shift to the respondent: **Glasgow City Council v Zafar** [1998] I.C.R. 120, HL.

17. In cases of harassment, contrary to section 26, there must be unwanted conduct 'related to' a protected characteristic. In **Land Registry v Grant** [2011] ICR 1390, where he cautioned tribunals that they must not cheapen the significance of the words of section 26 requiring the effect of a violation of dignity, or the creation of an intimidating, hostile, degrading, humiliating or offensive environment, and that those words are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

18. In cases of victimisation (section 27 Equality Act 2010), the employee must have been subjected to a detriment because he/she did a protected act.

19. In detriment claims under section 48 ERA 1996, in contravention of section of that Act, the rights in question are set out in section 44(1) and (1A).

20. Section 23(2) ERA 1996 provides: that:

"Subject to subsection (4), an Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with -

(a) *In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made*"

21. Subsection (4) provides that:

"Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

22. First, the Claimant must show that it was not reasonably practicable to present this claim in time; second, if he succeeds in doing that, the employment tribunal must consider the time within which the claim was in fact presented to be reasonable. What is reasonably practicable is a question of fact in every case. The onus of proving that it was not reasonably practicable to present the play in time rests on the claimant: **Porter v Bandridge** [1978] I.C.R. 943.

23. Whilst the issue may be a question of fact for the tribunal to decide, nevertheless the provision should be given a liberal construction in favour of the employee: **Dedman V British building and engineering Appliances Ltd** [1974] I.C.R. 53, CA.

Discussion and conclusion

24. The hearing of 17 January 2022 was listed to consider:

24.1. Whether to strike out parts of the Claim or order a deposit;

24.2. Whether the complaint of unlawful deduction of wages was presented out of time and if so, whether time should be extended;

25. I struck out a number of the complaints and dismissed the unlawful deductions claim.

Strike out

26. I take and apply the principles derived from the above cases (**Chandhok**, **Madarassy** and **Zafar**), not as 'rules of law' as such, but as important points of principle to bear in mind when analysing the prospects of success of the Claimant's complaints (taking them at their highest) and in exercising my judgement on whether to strike out any part of the Claim.

27. The Claimant, despite being given every opportunity to do so, had failed to articulate a coherent case of direct discrimination or harassment which could be advanced to a final hearing. Having tried very hard – but ultimately failing - to identify such a case from the Claimant's pleadings and further information, I

concluded that some of his complaints, as I was able to identify them, had no reasonable prospect of success.

Direct discrimination/harassment

28. The Claimant uses these phrases interchangeably. Of course, that is not unusual, as it is often the case that the two are pleaded in the alternative (section 212 Equality Act 2010 providing that they are mutually exclusive). I had extracted from the Revised Particulars what I understood to be the acts/failures complained of (this was not a replacement for the Revised Particulars, but an attempt to identify what it was said the Respondent had done).

29. The test on considering whether to strike out a part of a claim is whether it has no 'reasonable' prospect of success. It is not whether it has 'no prospect'. Nevertheless, as I reminded myself, it is a high test and the exercise of the power is to be used sparingly.This is a case which has every appearance of being a wide-ranging grievance and general dissatisfaction with his employer and where the Claimant is unable to identify anything other than the things he complains of and his various protected characteristics. There is a real danger that a full-hearing involving everything that the Claimant wishes to complain of, going back many years, is rendered the equivalent of a grievance hearing, in which the Claimant simply makes reference to multiple statutory provisions because they look to him as if they fit with what he is saying. I appreciate that many of the statutory provisions are not easy to understand, especially for litigants in person. It was for that reason that I tried to extract the acts/failures complained of with a view to applying the relevant provision.

30. The Claimant had used the terms 'bullied' and 'harassed' to describe his treatment. Those are of course, descriptive terms. That is why Judge Martin ordered him to set out the actual conduct relied on (para 1.6 of her order). In reviewing what the Claimant said in response to that order, and in reviewing the Revised Particulars, I noted that there was still a distinct lack of specificity. Further, where there was specific reference to conduct (see the Appendix to the October 2021 hearing) there was little, if anything, from which it could properly be inferred, that the unwanted conduct related to any particular characteristic.

31. For example, Mr Farley was unable to say in what way the failure to arrange a timeous appeal (paragraph 13 of the October summary) related to any of the protected characteristics. As regards paragraph 16.1 of the October summary, he said that the conduct related to age because it was said to him and Mr Ashby and they were of a certain age. He said it related to 'disability' because he regarded it as a comment on his and Mr Ashworth's 'abilities' and therefore, in his opinion, to 'disabilities'. As regards paragraph 23.2 of the October summary he said that Helen Stubbs believed he had spoken rudely and she was drawing an unfavourable comparison with how people at the shipyard spoke to each other – wrongly believing the Claimant to have worked on a shipyard. Mr Farley said that, although he did not know what she meant, he would say this was age-related harassment because of the fact that the shipyards closed over 40 years ago and that reflects on his age. Taking it at its highest (and assuming

Ms Stubbs said what the Claimant contends, namely that he used to work in the shipyards) there is no reasonable prospect of a tribunal concluding that the conduct related to age, as opposed to his manner, which is how he described it today. Further, bearing in mind the words of Elias LJ in **Land Registry v Grant**, I was of the view that there was no reasonable prospect of a tribunal concluding that the single, passing comment had the purpose or effect of creating the proscribed environment, especially given that the Claimant did not understand what she meant at the time and has ascribe a meaning to it after the event.

32. When I asked the Claimant whether he was relying on anything other than the fact of his various protected characteristics and the treatment complained of in the Appendix or the Revised Particulars, or anywhere else, he said that he was not. He argues that he has been the victim of direct discrimination (or harassment) in the way complained of by the fact that he happens to be a man of a certain age or a man of a certain age with respiratory issues and the fact that (as he alleges), these things happened to him. For example, the fact that the crematorium or office was not covid-19 secure. He argues that, taken with the fact that he is a man of a certain age with respiratory issues, those things mean that 'it is discrimination'. As he put it more than once, it was 'common sense' that these things amounted to discrimination on grounds of disability, age and sex. I should say that, although Mr Farley relies on the combination of his characteristics in his claim of direct discrimination (despite section 14 Equality Act 2010 not being in force), I considered his arguments on the basis of him having separate characteristics.

33. On looking further through the Appendix, and having previously considered in detail the original ET1, the further information and the Revised Particulars, where Mr Farley describes events as undermining, or humiliating or that he was shouted at and that managers were unpleasant or derogatory or biased, or bullying or harassing, the allegations are largely devoid of content. What he regards as setting out with clarity the things that the Respondent did, I conclude to be his characterisation of the things that they allegedly did. Thus, he describes everything as bullying or harassment without identifying what it is that amounts to bullying or harassment. I consider there to be no reasonable prospect of him being more specific at a final hearing (and he has been ordered to be specific) nor do I consider there to be any reasonable prospect of a tribunal concluding that the motivation (conscious or subconscious) for interacting with the Claimant in the way he alleges to be because of or related to any of his protected characteristics or because he presented an equal pay grievance back in 2014.

34. Adopting the phrase from **Madarassary,** the Claimant has not pointed to and confirmed he will not be able to point to 'something more'. He comes back to the fact that he is a man of a certain age with respiratory issues. I was satisfied that as regards the complaints of direct discrimination and harassment, there was no reasonable prospect of the claims succeeding – indeed no reasonable prospect of the Claimant establishing a prima facie case.

35. Having concluded that there was no reasonable prospect of success, I retained a discretion whether to strike out or not. I considered whether an amendment of the claims might be ordered so as to avoid that result. However, I was not at all confident that this would bring any further clarity or improve the prospects given the history of the proceedings thus far. Whatever way one looks at it, the case Mr Farley is advancing relies simply on the fact that he has protected characteristics and the things he complains of happens (as he alleges).

Indirect sex discrimination

36. This had not been identified by me in paragraph 1.2 of the orders of **28 October 2021**. That was because, as I understood it from the extensive discussion at that preliminary hearing, the Claimant's complaint as described in paragraph 31 of that case management summary was limited to one of disability. During the public preliminary hearing of **17 January 2022**, Mr Farley said that it should also refer to sex and also to age.

37. I struck out this complaint in so much as Mr Farley wished to argue indirect sex discrimination. I did so because Mr Farley confirmed that he will not be adducint any evidence on the effect of covid on women and men generally. There is no reasonable prospect of establishing group disadvantage. I must say that it seems an unnecessary point in any event, given that his real position is that he is in his 60s and has a respiratory condition confirmed, he says, as asthma and bronchitis. It is well recognised that covid is a greater risk to older people and to those with underlying health conditions (especially respiratory conditions) and it seems to me that the addition of a third protected characteristic is unnecessary in any event. Whilst this was not identified in my order of 28 October 2021, for the reasons stated above, I was satisfied that no prejudice was caused to the Claimant by me considering whether to strike it out and it would be disproportionate to have a further hearing to consider whether to strike that part of the claim out.

Victimisation

38. The same goes for the complaint of victimisation. That had been identified as a 'potential' claim by Judge Martin when she issued her orders back in February 2021. Judge Martin directed the Claimant to identify the protected act(s) and detriment(s) relied upon in paragraph 1.7 of her orders. The Claimant's response to that order was set out in 6 paragraphs. However, it did not feature in the Claimant's Revised Particulars – thus it was not identified in my order paragraph 1.2 in October 2021. It resurfaced at the public preliminary hearing, when the Claimant made a passing reference to it on page 16 of his written representations (**page 236** of the hearing bundle). Therefore, it appeared that the Claimant wished to revive that part of his claim.

39. The Claimant has used the terms victimisation and discrimination interchangeably.

40. Mr Farley said that he had also done protected acts, and that he felt victimised, that the things that happened to him were because he had done these acts. After a discussion about this, he said he had done protected acts as follows:

    40.1. he presented a team grievance in 2014 – 2015 against the WFT grading and claiming equal pay;

    40.2. he presented a grievance about the job application for the Housing officer role in 2019**;**

    40.3. he presented an equal pay complaint and grievance about his job description in 2020;

    40.4. he presented a grievance about bullying, harassment and lack of duty of care in 2020

41. He says that his pay was cut (in 2016-2017), his role of Housing surveyor was downgraded on WFT to a technical officer role because he complained about equal pay and that all of the bullying and harassment he has experienced was because of this. To the extent that he complains of direct discrimination and harassment on grounds of the combined characteristics of sex, age and disability, Mr Farley said that the things complained of were done also because he had presented these grievances.

42. As with his complaints of direct discrimination and harassment, the Claimant points to nothing other than that he presented grievances. I concluded that this complaint had no reasonable prospect of success for the same reasons as given in respect of the complaints of direct discrimination and harassment and that it was proper and proportionate for me to strike out at this hearing.

43. For completeness, I did not strike out a complaint under section 48 ERA for contravention of section 44 because, on my analysis, there was no such complaint pleaded on the Claim Form and none which, on a fair reading of it, could be discerned. Further, it did not feature in the Revised Particulars. Nevertheless, in light of the reference to section 44 in the Claimant's written representations of **02 December 2021**, I revisited the information provided by him in response to Judge Martin's case management order at paragraph 1.8. I have to say that I do not know why it was identified as a 'potential' claim (it may have been the simple reference to 'HSW' in the Claimant's Claim Form, but that is insufficient). In any event, upon reading the Claimant's further information in response to Judge Martin's order at paragraph 1.8, there is nothing there that brings the complaint squarely within section 44. However, there being no discernible pleaded claim in the ET1 or in the Revised Particulars, there was nothing to consider striking out.

Unlawful deductions – time point

44. The complaint here is that the Claimant was paid less than that which was properly payable to him back in March – June 2017. The Claimant gave evidence and was cross-examined.

Findings of fact

45. On **05 March 2020**, the Claimant first raised a query regarding pay protection which was paid back in 2016 to 2017 (**page 149**). As a result of what he was told (on which I emphatically make no findings) he says he only received pay protection from 01 June 2016 to about March 2017, whereas he should have been paid protected pay up to the 01 June 2017.

46. The Claimant had always received a monthly pay statement which set out his gross and net monthly pay. Despite reading his monthly pay statements when they arrived, the Claimant did not at the time notice any shortfall in his monthly pay in March, April or May 2017. The Claimant knew what the pay protection arrangements were and had raised a dispute about the fact that he was in pay protection as a result of the Respondent's workforce transformation project.

47. The Claimant does not know and is not able to say how much, if anything, he was underpaid in March, April or May 2017. He has not retained any pay slips or statements relating to that period of time.

48. Although on **05 March** 2020 he queried whether he was underpaid back in 2017 (without ever having noticed any shortfall) he did nothing more about it until **November 2020** when he complained about the (unidentified) shortfall to HR. Nothing had prevented the Clamant from presenting a complaint to the employment tribunal between March 2020 and November 2020. Indeed, in cross examination, when asked by Mr Forster why he did not present a claim in that period, he said that he would not 'present a claim for that sort of figure'.

49. What I take the Claimant to mean by that is that the figure was so low that he would not present a claim just for that. How he could regard it as a 'low' figure was odd, given he was singularly unable to say what had been deducted.

50. The original time limit expired on **31 August 2017**. Mr Farley contacted ACAS on **17 September 2020** and an EC certificate was issued on **31 October 2020**. The complaint was presented on **21 November 2020**.

Discussion and conclusion

51. Mr Farley had not persuaded me that it was not reasonably practicable to have presented his complaint in time – the burden rests firmly on him to do so. His explanation for not presenting a claim before he did was that he never knew that he had suffered any deduction of wages until March 2020, even though he accepted receiving monthly pay statements and that he had disagreed at the time with the new grade for his post under the Respondent's workforce transformation (WFT). He did not know what deduction, if any, was made or when. His claim is, putting it bluntly, hopeless, in any event.

52. Further, although he was unable to say what deduction, if any, was made, he believed as of March 2020 that something had been deducted. His explanation in evidence for not presenting a complaint then was that he would not present a complaint just for that amount.

53. I had no hesitation in concluding that it was reasonably feasible for the Claimant to have presented a complaint within three months of the last alleged deduction – if anything, he was in a ideal position to know what it was that was deducted (if at all) back in 2017 because he was in receipt of the monthly payslips. If he was ignorant of the fact that a deduction was made (and I am far convinced any was) then his ignorance was unreasonable, given that he had the very means to determine whether he had been paid less that was properly payable.

54. Further, he did not present his complaint within a reasonable period. It was over three years since the time-limit expired when the Claim was presented. That is not a reasonable period. In those circumstances the claim is out of time and must be dismissed. I would add again that it was hopeless in any event, given he accepted he did not know and was not in a position to say what if anything had been deducted.

55. Therefore, the complaint of unlawful deduction of wages is dismissed.

Employment Judge **Sweeney**

4 February 2022