EMPLOYMENT TRIBUNALS

RECONSIDERATION HEARING BY VIDEO

Claimant: Mr R Walker

Respondent: The Chief Constable of Cleveland Constabulary

Heard: Remotely by video **On:** 18 and 19 July 2022

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In Person
Respondent: Mr J Arnold, Counsel

RECONSIDERATION

The judgment of the Tribunal is that:

1. The claimant withdrew Allegation 2. His application to restore it is refused. Allegation 2 is dismissed.

2. The claimant's application for a reconsideration of my decision to strike out Allegations 2, 3, 4, 5, 6, 7, 13, 22, and 37 of his claim under the principles set out in the case of **Tiplady** is refused.

3. The claimant's application for a reconsideration of my decision to strike out Allegation 1 of his claim is refused.

4. The claimant's application for a reconsideration of my decision to make a deposit order in respect of Allegations 14, and 24 is refused. His application for revocation of the Deposit Order in respect of Allegation 25 is granted. A further deposit order shall be prepared.

5. Upon withdrawal, Allegations, 8, 11, 12 and 17 are dismissed.

REASONS

Background and History of the Claims Before this Hearing

1. The claimant was engaged by the respondent from 18 September 1996 to 4 January 2021. He was latterly a Police Inspector before he resigned from his post. The claimant brought claims of associative direct discrimination because of the protected characteristics of race and disability, direct discrimination because of the protected characteristic of disability, victimisation and detriment short of dismissal because he made protected disclosures.

2. The claimant began early conciliation with ACAS on 30 April 2020 and received an early conciliation certificate on the same date. His ET1 was presented on 4 May 2020.

3. A private preliminary hearing by telephone (TPH) was conducted by Employment Judge Morris on 17 February 2021. In his case management order (CMO) dated 22 February 2021 [134-144], EJ Morris listed a public preliminary hearing (PuPH) to determine the matters referred to at paragraphs 3, 6, 7 and 8 of the document titled "Draft List of Issues v2" [147-182] that had been prepared by Mr Arnold with comments from the claimant in the paragraphs in italics.

4. I heard the PuPH on 19-22 April 2022. I struck out some of the claimant's Allegations and made Deposit Orders in respect of others.

5. Mr Walker made application for reconsideration of parts of my decision on 21 June 2021. In the application and in response to questions I raised with him about his application, he confirmed that he would not be paying some of the deposits ordered. I have marked those Allegations (8, 11, 12 and 17) as dismissed upon withdrawal.

6. This is the hearing of his application.

Housekeeping Matters

7. The hearing was conducted remotely by video with the agreement of the parties and in accordance with the President of the Employment Tribunals in England & Wales; Road Map.

8. The parties produced a supplementary bundle of 247 pages. If I refer to any documents from the original bundle (produced for the PuPH), I will indicate the appropriate page numbers in square brackets (e.g. [23]). If I refer to any documents from the supplementary bundle, I will indicate the appropriate page numbers in square brackets with the prefix "SB" (e.g. [SB240]). At the start of the hearing, I checked with Mr Walker and Mr Arnold that I had all the documents I needed to make my decision. The parties' skeleton arguments and joint case management agenda had not reached me, despite them having been submitted on Friday 15 July. Ms Vallely, solicitor for the respondent, kindly sent me the missing documents, but I had to take a break to read them.

9. Before I took a reading break, we dealt with some preliminary issues:

    10.1. Mr Walker said that he had made an error by indicating that he was not challenging my decision to make a strike out order in respect of Allegation 2 and that the claim could be allowed to fall away. I said I would deal with that application as a first preliminary matter after the break;

    10.2. Mr Arnold drew my attention to two typographical errors in the deposit order I had prepared after the previous hearing: in respect of Allegation 11 at paragraph 10 of the order [SB40], and in respect of Allegation 25 at paragraph 16 of the order [SB42], I had used words that indicated that those claims were struck out, rather than (correctly) indicating that they were subject to a deposit. I apologised to the parties and indicated that I would amend the deposit order under the slip rule (Rule 60 of the Employment Tribunals Rules of Procedure 2013). Subsequent to the hearing, I decided that as I was making fresh Deposit Orders that took into account developments since the original Orders were made, and that Allegation 11 had been withdrawn by the claimant, I could deal with the issue entirely within the new Deposit Orders. It was not in furtherance of the overriding objective to amend an Order that had been entirely superseded.

10. After the break, I dealt with Mr Walker's application to restore Allegation 2. I then heard submissions on Mr Walker's application for reconsideration in respect of:

    11.1. My strike out of Allegations 2, 3, 4, 5, 6, 7, 13, 22 and 37 on the principles set out in the case of **Tiplady v City of Bradford Metropolitan District Council** [2020] IRLR 230 ("**Tiplady**") – which was referred to as "The Second Issue" at the previous PuPH; and

    11.2. My strike out of Allegation 1 on the grounds that it had little reasonable prospect of success – this was part of what was referred to as "The Third Issue" at the previous PuPH; and

    11.3. My deposit orders in respect of Allegations 14, 24, and 25 – this was also part of what was referred to as "The Third Issue" at the previous PuPH.

12. Mr Walker confirmed that he was not going to pay the deposits on Allegations 8, 11, 12, and 17 and that these could be dismissed. I have dismissed those claims and Allegation 2 (following my decision on Mr Walker's application).

13. I made my decision on the reconsideration applications on the afternoon of the first day of the hearing and delivered it on the second morning. I then dealt with the outstanding case management matters and produced a separate case management order.

Relevant Law

11. I was mindful of the overriding objective to deal with cases justly and fairly in Rule 2 and the Tribunal's wide case management powers under Rule 29. I reminded myself of my discretion to amend any time limits under Rule 5 and the provisions relating to reconsiderations in Rules 70 to 73.

12. I considered the following cases that were brought to my attention by the parties and reminded myself of cases that had been raised at the previous PuPH that are referred to elsewhere herein:

    13.1. **Tiplady v City of Bradford Metropolitan District Council** [2020] IRLR 230;

    13.2. **Ameyaw v Pricewaterhousecooper Services Ltd** EA-2019-000480;

    13.3. **Outasight VB Ltd. V Brown** UKEAT/253/14;

    13.4. **Newcastle upon Tyne City Council v Marsden** [2010] ICR 743, EAT; and

    13.5. **Ministry of Justice v Burton** [2016] EWCA Civ 714.

Claimant's Application to proceed with Allegation 2

14. I refused the claimant's application.

15. In his application for reconsideration [SB72-SB84], the claimant stated at paragraph 11 [SB74]:

> *"The Claimant requests that allegations (**Not 2 as the Claimant feels they are lacking evidence to prove this**) [my emphasis] 3, 4, 5, 6,7,13, 22 and 37 be reconsidered."*

16. The claimant stated at paragraph 5.9 of his response to the questions I raised about his application [SB152]:

> "*5.9 Please note allegation 2 is not being requested to be reconsidered."*

17. Mr Walker attributed his application to having made a terrible mistake and took full responsibility. He had got it into his head that Allegation 2 was about a meeting of senior officers at Cleveland Constabulary, rather than a management plan to oust him.

18. I took into account that this is a complicated case with a lot of detail and that the claimant is representing himself. However, he made the choice to withdraw the Allegation and gave a reason for doing so (lack of evidence).

19. The claimant's application was made on the morning of this hearing – 18 July 2022, nearly a month out of time. However, I have the discretion to extend time under Rule 5.

20. I find that the claimant had abandoned Allegation 2.

21. I find that the claimant would only be seeking a reconsideration of Allegation 2 in any event on the basis that I had misapplied the law in **Tiplady**. I find that balance of prejudice is in favour of the respondent. The respondent is more prejudiced by the restoration of Allegation 2 than the claimant is by my refusal, as the application was made on the day of the hearing and the respondent hah had no time to prepare a response.

Second Issue – Claimant's Application to restore Allegations struck out

22. I struck out the claimant's Allegations 2, 3, 4, 5, 6, 7, 13, 22 and 37. The Allegations relate to the actions of Cleveland Police in arresting the claimant and processing him through the early stages of the criminal justice system. The respondent's case in respect of this aspect of the hearing was that this was an exercise of its powers as a Police service, not as the claimant's employer. The authority for that proposition was the Court of Appeal decision in the case of **Tiplady v City of Bradford Metropolitan District Council** [2020] IRLR 230 ("**Tiplady**"). I found in favour of the respondent at the last PuPH.

23. I considered the skeleton arguments submitted by Mr Walker and Mr Arnold and listened carefully to their oral submissions. Reconsiderations can only be made in respect of judgments per Rule 1(3) of the Rules of Procedure. The scope of reconsideration is limited to varying, maintaining or revoking a decision. To that end, a Tribunal has no power to reconsider a decision where it has declined to strike out a claim, but the party who has 'survived' the strike out seeks to challenge a particular reason that had been adopted when finding in their favour (**Ameyaw v Pricewaterhousecooper Services Ltd** EA-2019-000480*).* Part of the claimant's application for reconsideration took issue with my reasons.

24. I find that the law on reconsiderations was accurately summarised by Mr Arnold in paragraphs 11 to 15 of his skeleton argument. I set out the provisions of Rules 70 to 73 in my CMO dated 30 May 2022, following the last PuPH.

25. It is not a criticism of Mr Walker to find that his submissions concentrated on the evidence that he would seek to bring at the final hearing of this case. However, my consideration of this matter goes back to the start of the previous PuPH. My Judgment and Reasons record that Mr Walker and Mr Arnold agreed that I had all the documents that I needed to determine the respondent's applications. I have no doubt whatsoever that this point was agreed. In his application for reconsideration [SB73 (§7)], Mr Walker suggested that my Reasons should have noted that I had excluded some documents that the claimant sought to include in the PuPH bundle.

26. I find this point to be an attempt to rewrite the history of this case. I dealt with the claimant's application for specific disclosure of documents for the PuPH on 17 June 2021. The claimant was unable to persuade me that the documents he sought were necessary to justly and fairly determine the PuPH. He did not appeal that decision.

At the disclosure hearing, I made it clear to Mr Walker that a PuPH to consider strike out and deposit was not a battle of evidence. It is an assessment of the case on the papers.

27. His submissions sought to bring new evidence about the whole factual nexus of Allegation 2 (which concerned the claimant being arrested for suspected theft for removing a safe that he says he had permission to remove). I find that the factual nexus is of much less relevance than the reason that the claim was struck out – the **Tiplady** principles. I prefer Mr Arnold's submissions on the **Tiplady** principles to Mr Walker's. Put simply, I find that if Mr Walker was correct, then a police officer would have an additional route to remedy if they were arrested and put through the criminal justice system than a member of the public would have. That is one of the key points in **Tiplady**. I find that it is not relevant to this case that the claimant may not have had any faith in the PCD. That is his choice. The fact remains that the PCD option was there. I also believe that the claimant could have engaged the IPCC process.

28. Mr Walker also suggested [SB73 (§6)] that I had lost my notes of the hearing and may have not considered his arguments fully. I repeat what I said in this hearing: I typed up my decision and reasons on the strike out and deposit issues in a Word document. I then used that document to give an oral Judgment and Reasons. I then lost the Word document on my laptop. It was irretrievable. I did not lose my handwritten notes of the hearing and fully considered the points made by both sides when creating the written Judgment and Reasons.

29. On this issue, I find that the evidence that the claimant sought to adduce at this hearing was available and should have been presented at the PuPH hearing. By allowing him to enter the new evidence (and therefore present a new and different case), I would be allowing him to relitigate a point that he has already lost. That would be contrary to the principles expressed by Judge Eady QC (as she then was) in **Outasight VB Ltd. V Brown** UKEAT/253/14; Underhill P (as he then was) in **Newcastle upon Tyne City Council v Marsden** [2010] ICR 743, EAT; and Elias LJ **in Ministry of Justice v Burton** [2016] EWCA Civ 714.

30. Further, I find that I did not misapply **Tiplady** in my Judgment and Reasons in the previous PuPH. I do not think it necessary to repeat paragraphs 52 to 79 of my Reasons in the PuPH.

Third Issue – Strike out of Allegation 1

31. I repeat that the precedent cases are clear that reconsideration is not an avenue for a party to relitigate a point it has lost at a previous hearing. The claimant's application was based on a thorough restatement of the evidence in respect of Allegation 1, which concerned a complaint against police and private defamation claim. These were the matters set out in the agreed list of issues at the PuPH.

32. In his application, the claimant says that I ignored the fact that his computer access was withheld. He also states that I did not deal with the part of Allegation 1 that relates to a complaint that the respondent delayed and prolonged the complaint against police and private defamation action for 2 years. I will deal with the second of those points first.

33. In my Reasons for the strike out, I found that:

"This is an allegation that the respondent manufactured a complaint against the police ("CAP") and a private defamation claim against him. It is undisputed that the claimant sent an email dated 1 January 2016 to approximately 150 serving officers of the respondent [196-197]. The email began "Dear Mark". The claimant confirmed that "Mark" was Mark Richardson, who was the Secretary of Cleveland PF at the time. The email stated:

> *"My information is that you have been conspiring against Paul Brown for some time and that there may even be a recording of you doing so with Grant Thorburn as well as evidence of Federation leaks directly to PSD."*

Grant Thorburn, who was a former Police officer with Cleveland Police who joined Cleveland PF on retirement, made a complaint to Cleveland Police [198-206] about the allegation made in the claimant's email.

Mr Thorburn instructed solicitors, who sent the claimant a letter before action dated 18 February 2016 alleging that the claimant had defamed their client [207-211].

I find that this allegation has no reasonable prospect of success and is struck out. I make that finding because:

5.1. The email sent by the claimant was, at best, unwise. I find it indisputable that the email accuses Mr Thorburn of a serious criminal offence;

5.2. Even if the claimant is correct to say that he ignored the letter before action and no proceedings were ever issued, the allegation of defamation was made through solicitors and the complaint was made to Cleveland Police. I find that it is highly likely that both the letter before action and complaint were made by Mr Thorburn of his own motion, rather than at the bidding of the respondent; and

I cannot see that there would have been any benefit to the respondent to encourage Mr Thorburn to make the complaint. The claimant's allegation is mere assertion."

34. I do not necessarily agree with Mr Walker's assertion that I failed to deal with matters that I was seized of, as there was no mention of the removal of access to the IT system or prolonging of the defamation and complaint matters in the issues that I recorded in my Judgment and Reasons.

35. However, I will deal with the issue of the 2-year prolongation of the matters. I find that as I made a finding that the claim about the email of 1 January 2016 had no reasonable prospect of success, it is a matter of logic that a claim based on an allegation that the respondent prolonged the process for 2 years cannot possibly succeed. That aspect of the Allegation is struck out.

36. I do not necessarily agree that I was seized of the IT withdrawal issue for the same reasons, but I find that this claim has no reasonable prospect of success and is struck out on reconsideration. I make that finding because the claimant's evidence at its height is that he has to accept that he sent the email on 1 January 2016 [216-217]

to 150 colleagues. I previously found that the email accused Mr Thorburn of a serious criminal offence. Mr Thorburn was not a police officer at the time. The claimant then attended work on the evening of the same day (1 January 2016) and found that his computer access has been locked. He complained to Beverley Gill by email dated 1 January 2016 timed 21:12pm [SB196], but she had already authorised the account to be unlocked at 20:00pm that evening [SB197]. It is clear from the claimant's own email [SB196] that the stated reason that his system was locked was "Misuse of the system". I find the use of quotation marks to be grammatically appropriate. I find that the chance that the claimant can show that the locking of his system (which was immediately unlocked on his request) was that he did a protected act or made a protected disclosure is so low as to constitute no reasonable prospect of success. That aspect of the Allegation is struck out.

Third Issue – Deposit Orders in Respect of Allegations 14, 24 and 25

37. I would remind Mr Walker of what I said in my Reasons for making the Deposit Orders in his case: when determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case - **Wright v Nipponkoa Insurance (Europe) Ltd.** EAT/0113/14 *per* Her Honour Judge Eady QC;

38. The power to order a deposit can, in principle, be exercised where the tribunal had doubts about the inherent likelihood of the claim succeeding. The Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response – **Van Rensburg v Royal Borough of Kingston-upon-Thames** EAT 0096/07 *per* Elias P;

39. **Ahir v British Airways** [2017] EWCA Civ 1392 - appropriate cases for strike-out (and thus even more so for a deposit order) include cases involving mere assertions of sex discrimination or harassment. In particular, in **Ahir** at paragraph 24 *per* Lord Justice Underhill:

> "*As I already said, in a case of this kind, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced.*";

<u>Allegation 14</u>

80. This is the allegation that the claimant was removed from his role as Branch Secretary of the Cleveland PF. I found that this allegation had little reasonable prospect of success because:

> 80.1. The Cleveland PF is independent of the respondent, although it is closely related because of the work it does and the fact that serving and former officers hold positions within it;

80.2. The claimant admitted that he had removed a safe from the office, albeit that he asserts that he had the right to do so; and

80.3. To succeed, the claimant needs to establish a conspiracy or, at least a common purpose between the national PF and the respondent to remove the claimant as an act of discrimination, victimisation or detriment.

40. The important thing to remember about this claim is that it is the claimant's claim against the Chief Constable of Cleveland Constabulary. I find that the decision to remove the claimant was instigated by Cleveland PF, but actioned by Alex Duncan – National Secretary of PFEW. The claimant's assertion that I misunderstood the nature of the claim is, with respect to him, incorrect. Mr Murray of Cleveland PF may have provided the bullets, but Mr Duncan of PFEW pulled the trigger. I find it to be an inherent part of the claimant's claim in Allegation 14 that PFEW were involved in the conspiracy or common purpose of the respondent and Cleveland PF and that his chances of meeting the standard of proof is so low as to constitute little reasonable prospect of success. The application for reconsideration is refused.

Allegation 24

84. This is the allegation that the respondent has deliberately failed to confirm to the claimant that the criminal investigation file into his alleged theft of the safe has not been marked as "No Crime". I found that this allegation had little reasonable prospect of success. I made that finding because:

84.1. There was a conflict of evidence between the parties. The respondent asserts that the claimant was advised that the matter was to be "no crimed" on 1 April 2020, which was a date before the claimant filed his ET1. The claimant disputes this and says he has not been so informed, despite the production of the 1 April 2020 email from the respondent to the claimant [334]. However, the email only goes as far as to say that "In regards the no crime – The OIC will request that this is no crimed." It will be for the claimant to show that the alleged offence was no crimed.

85. I find that the claimant's claim as presented to this hearing was not the case that was presented at the PuPH. I was not presented with any conclusive or cogent evidence that proved the question of whether the allegation against the claimant had been no crimed or not. I genuinely do not believe that either of the parties truly know.

86. The claimant has two hurdles to jump in this case – Firstly, was his case no crimed, and secondly, if it wasn't no crimed, was it because he did a protected act or made a protected disclosure? Nothing I heard made me think that the claimant's prospects were any better than when I assessed them in April. There was also an element of the claimant relitigating this point with new evidence. The application for reconsideration is refused.

Allegation 25

87. This was the claim that the respondent failed to destroy photograph, fingerprints and biometric samples from the claimant taken in its investigation into the alleged theft of the safe. I found that this allegation had little prospect of success because:

    87.1. The email of 1 April 2020 [334] stated that "Once the custody record has been finalised all bio-metrics will be destroyed." The claimant has no evidence that suggests that this has not happened.

88. This was another Pandora's Box of new evidence, but rather than hope being the only thing that remained, an acceptance by the respondent that a photograph had not been destroyed remained.

89. I still find that the clamant faces an uphill battle, but I am minded to revoke the Deposit Order on Allegation 25.

90. I will now go on to conduct case management.

Employment Judge S A Shore

Date 19 July 2022