EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110269/2015 (V)

Preliminary Hearing Held by Cloud Based Video Platform on 10th May 2022

Employment Judge J Hendry

Mr. P McWilliams	**Claimant** **Represented by: -** **Mr. E Hawthorn,** **Advocate**
Scottish Courts and Tribunals Service	**Respondent** **Represented by: -** **Mr. B Nichol, Solicitor** **Instructed by** **Ms L J Gilbert**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The application on behalf of the claimant to amend his claim is refused.
2. The claims made by the claimant are struck out.

REASONS

1 A preliminary hearing took place on the CVP platform on 10 May 2022 in order to consider the claimant's application to amend which was opposed and the respondent's application for strike out.

Background

2 There is a long history to this case which has unfortunately been prolonged due to the time taken in the determination of an appeal and through the illness of the claimant and his representative.

3. The claimant raised a claim in July 2015 against his former employers. The claimant had worked for them from the 26 September 2011 until the 16 March 2015. The claimant contended that he had been unfairly dismissed or been discriminated against on the grounds of his disability. The claim form included a narrative of events running to 107 paragraphs

4. The respondents lodged an ET3 accepting the claimant had a disability and denied that the claimant had been unfairly dismissed or discriminated against on the grounds of his disability. The respondents subsequently lodged Better and Further Particulars. The claimant in due course adjusted his position in the light of the respondent's Better and Further Particulars. Parties agreed that the case should proceed to a hearing to consider the principal claim which was for adjustments and a Judgment issued on 5 February 2018.

5. The Judgment did not deal with all the outstanding claims but with the issue of reasonable adjustments as had been agreed. In the course of the Judgment the Tribunal made various findings in fact.

6. A further hearing took place on 18 March 2019. A reconsideration of the Judgment was sought by the claimant. The case was subject to appeal. The appeal was dismissed on the 23 December 2020.

7. A preliminary hearing for case management by telephone conference call which took place on the 26 November 2021. I noted that the claimant's representative s position was that following the hearing and Mrs. Kelly s evidence at that hearing he had concluded that it was the first time the claimant understood that Mrs. Kelly was acting under the direction of David Shand, the Business Manager and accordingly he wanted to refamiiiarise himself with the papers and pursue a claim arising from Mrs. Ketiy s evidence and lodge an amendment to reflect this.

8. The respondents had written to the Tribunal on the 10 January setting out their understanding of the outstanding claims and seeking strike out of them and as an alternative Deposit Orders.

9. The claimant's representative lodged a Minute of Amendment. He expressed in paragraph 1 the background to the amendment as follows:

> *"1. Information sufficient to provide a proper basis for pleadings regarding the role played by the Respondent's Sheriffdom Business Manager, David Shand, in the Respondent's conduct towards the Claimant only became available to the Claimant on the 8th and 9th of December 2016 when the Respondent's witness, Ms Isabel Kelly, gave evidence on oath to the Tribunal that she had been acting throughout under the direction of her line manager, the Respondent's Sheriffdom Business Manager. Mr. David Shand, at monthly management meetings. That proper basis in evidence was not available to the Claimant at the time that the Claimant submitted Form ET1 to the Tribunal. This evidence is very relevant to the Claimant's case for four reasons. First, it casts substantial doubt on Mr. Shand's motivation and credibility in appointing himself to adjudicate on the Claimant's grievance about the Respondent's conduct and the value of his decision to reject the grievance. Second, the Claimant's lack of knowledge that Mr. Shand had appointed himself to adjudicate on the consequences of his own conduct significantly hindered the Claimant's ability to formulate and argue his appeal to the Director of Operations against the decision of*

Mr Shand. Thirdly, the involvement of Mr. Shand demonstrates that he acted as a controlling mind in the course of conduct by the Respondent towards the Claimant and that significantly strengthens the Claimant's position, in relation any plea of time bar, that the Respondent engaged in a course of conduct towards the Claimant. Finally, in the context of the controlling role played by the Sheriffdom Business Manager in the Respondent's treatment of the Claimant, the threat of disciplinary action against the Claimant that was contained in the Determining Officer's decision takes on a more sinister aspect and provides an evidential basis for a claim of victimisation. "

10. On 8 February 2016 the respondent's representative wrote to the Tribunal and the respondents in relation to a claim under section 15 of the Equality Act as follows:

"5. *Allegation of Discrimination Arising From Disability*

The claimant further notes that his (implicit) allegations of discrimination arising from disability, in terms of section 15 of the 2010 Act, were not mentioned at all during either of the preliminary hearings on 18 September 2015 or 5 February 2016 and the respondents. Form ET3 contains no facts upon which the respondent seeks to rely to defend these allegations. These allegations are contained in paragraphs 22, 32, 33, 34, 41, 44, 63, 64, 84. 95 and 100 of the paper apart that was sent to the respondent with Form ET1 on or about 22 July 2015. Some of those numbered paragraphs were identified by the claimant in the claimant's agenda for the preliminary hearing of 18 September 2015 (in paragraph S4(i) (and adopted in paragraph S5) of Schedule 1 of the agenda and in paragraph D7 (and implicitly in paragraph D5) of Schedule 2 of the agenda) that was copied to the respondent on 28 August 2015. These allegations are also subject to the claimant's striking out application, which remains live before the Tribunal. If late answers

are to be allowed from the respondent in respect of discrimination arising from disability, these should include the whole facts that the respondent proposes to rely upon and should be subject to ah unless order in similar terms to those sought for the whole of the facts that the respondent seeks to rely upon in respect of reasonable adjustment and harassment. "

11. The respondent's representative wrote to the Tribunal on 24 January opposing the application to amend.

12. The claimant had lodged an Agenda document on 18 September 2015 and at box 2.1 responding to the question of whether or not a complaint was being made under section 15 of the Equality Act had written "unsure" and in the attached Schedule section D5 in relation to discrimination arising from disability he had responded "unsure this may be covered elsewhere".

Submissions

13. The process adopted was that Mr. Hawthorn began by setting out the basis of his Minute of Amendment. In brief his position was that only after the hearing could the role of Mr. Shand have become apparent, and this had promoted the amendment. Mr. Nichol then set out his opposition to the Minute of Amendment. Mr. Nichol proceeded to move his application for strike followed by Mr. Hawthorn setting out his submissions opposing that application. I trust that I will reflect both side's positions as we work though the various issues.

14. There was to a certain extent an overlap between the submissions relating to amendment and strike out particularly when considering the background to both.

Claimant's Application for Amendment

15. Mr. Hawthorn accepted that there were 2 existing claims that had been clearly articulated namely harassment and direct discrimination. His position was that the respondents had been given notice that there was a claim for discrimination arising from disability "in the wings' They could not pretend to be unaware of this. In his view there were 2 components to the application. The first was it was only after Ms Kelly s evidence it became clear that she was acting under the direction of her superior David Shand. The claimant might have suspected his involvement but could not properly plead a case against him at this stage until Mrs. Kelly confirmed his role. The claimant had thought Mr. Shand was truly independent when dealing with his grievance but while he was holding himself out as an independent adjudicator he had been intimately involved with the initial decision.

16. Mr. Hawthorn accepted that the matter was then appealed on. His position was that the claimant had suffered a disadvantage because of Mr. Shand's involvement. Mr. Hawthorn's position was that it would only be once the Tribunal had heard evidence from Mr. Shand it could gauge his motivation. Mr. Hawthorn then considered section 15 and section 13 of the Equality Act. He reiterated that only once the Tribunal had heard the evidence could it decide on motivation. In his view what was significant in the case was there was no record to suggest that the respondents took the issue of disability seriously despite their claim that they acted "as if the claimant was disabled". In his response to the grievance Mr. Shand had suggested the possibility of the claimant being disciplined. This brought in the question of whether or not Mr. Shand's actions were victimisation under the Act (at this point I queried whether or not Mr. Shand had acted the way he did because of the claimant's disability or whether the matter related to attendance). Unfortunately, neither party had to hand the grievance letter or outcome.

17. Mr. Hawthorn emphasised that the manager had acted as a judge in his own cause and the victimising element as he put it was the threat of disciplinary consequences

18 The amendment was to clarify the issue of disability and Mr. Hawthorn's submission was that once the class of disability had been ticked and introduced in the ET1 it was open to him to identify other types of disability discrimination. He accepted that the Agenda document confirmed that he was not sure the respondents should have understood that such a claim could be inferred from the facts.

19. Mr. Hawthorn made reference to the case management discussion in February 2016 and the detailed specification given in his email of the 10 February 2016. His position was that the Tribunal' had given the respondents latitude to amend their skeletal defences to avoid a strike out application and the claimant should be given the same opportunity to amend. The disadvantage suffered by the claimant related to his anxiety and each “knock back" added and exacerbated his condition. He then explored section 15 of the Act and what was required to engage that section, in his view the respondents could not argue a proportionate means of achieving a legitimate aim. They have no pleadings addressing this matter and would have to adjust their own ET3. The treatment of the claimant arose as a consequence of his disability.

20. Mr. Nichol opposed the amendment and did not accept that the evidence disclosed that Mr. Shand had behaved in any way improperly. If the claimant had felt Mr. Shand had behaved improperly then he should have lodged an amendment immediately after the hearing. The fact that the case was at appeal made no difference in his view. The Agenda document did not identify this claim nor had it been articulated as a claim until now. The claimant was now attempting to add a victimisation claim and a section 15 claim.

21. In any event Mr. Nichol submitted that a section 15 claim (discrimination arising from disability) did not fit the evidence. The requirement in Mr. McWilliam’s contract to work in the court included an objective justification for making him do so. The evidence which the Tribunal

a ted was that his job we *e* entially to work in lwe/workmg courts. Mrs. Kelly was under pressure to staff those courts. His dismissal arose because he could not do so.

22. In his view there was a confusion in the respondent's representative's mind. Better and Further Particulars could only be used to give further specification of what is in the ET1. Agenda documents are not pleadings. The application before the Tribunal is clearly an amendment to add 2 new causes of action. The reason for the amendment at this stage is given that new facts have arisen. That was not correct. Mrs. Kelly had given evidence in 2016 about events some years earlier. There was no stateable victimisation claim. Despite running to 107 pages the ET1 did not encompass any of these claims

23. Mr. Nichol then turned to the issue of time limits. The Tribunal had heard nine days of evidence and the background to the claimant's termination of employment had been fully canvased. The claims of victimisation and discrimination arising from disability were out of time even at the point the ET1 had been lodged.

24. **Mr.** Hawthorn responded referring to the case of **Hendrick.** The Tribunal should not dismiss claims because of time bar without hearing ail the evidence. It was in his view a course of conduct and this allowed him to revive earlier claims. He didn't accept that there had been a delay in lodging the amendment. The case had only come back to the Tribunal following the appeal. It was the first opportunity the Tribunal had a chance to consider the future conduct of the case and thus it was an appropriate point to lodge an amendment. There had been numerous delays including delays caused by the pandemic and illness and they should not count against the claimant. The ET 1 had been lodged by him in an area of law which he was unfamiliar, and he had done his best to properly reflect the background circumstances.

25. Mr. Nichol in turn made reference to the cases of **Cocking v Sandhurst Stationers Limited** [1974] **ICR** 650 and to **Selkent Bus Company Limited**

(trading as Stagecoach Selkent) v Moore [1996] IRLR 661. The victimisation complaint he said was wholly new. The discrimination arising complaint was also new and involved a significant new factual pleading running to approximately 38 paragraphs. The authorities made reference to the applicability of time limits and to the timing and manner of the application for amendment.

26. Mr. Nichol made the application for strike out on two rounds: firstly, there was no reasonable prospects under section 37(1)(a) of the Rules; secondly the claims were time barred under section 123 of the Equality Act. Finally, as an alternative he made an application for Deposit Orders depending on which claims proceeded.

27. In his view there were only two outstanding claims. The first related to Mrs. Kelly asking the claimant to try and work in 'live courts". She had made adjustments such as offering him "quiet" courts to work in. With reference to paragraph 101 of the ET1 which says "between late summer of 2012 and 16th March 2015 (dismissal) the respondent engaged a course of conduct towards the claimant that amounted to discrimination because of the claimant's disability and harassment because of the claimant's disability. The course of conduct began with a failure to consider reasonable adjustments that ended in dismissal." The respondent's position was there was no reasonable prospects of the claims succeeding. Mr. Nicol made references to the claimant's pleadings and to the Judgment in particular at paragraph 144 which read: *"We did not accept that Mrs. Kelly had been anything other than a patient, supportive Manager"* and at the final paragraph *"We would finally record that this was a case where we detected no antipathy whatsoever towards the claimant who was regarded as being able and hardworking and that there is always room for improvement and though mistakes may have been made especially with the benefit of hindsight when dealing with his condition and how that impacted on his work it was clear that the respondents staff (acted) sic (tried their best in difficult circumstances to get the claimant back to work or employed elsewhere."* Any conduct under section 26(1)(a) cf the Equality Act

(harassment) must relate to the disability. Mr. Nichol then turned to direct dis rr a on. The claimant was d ssed (not because of his disability but because he was unable to carry out his work) Cordell **v Foreign and Commonwealth Office** UKEAT/0016/11. Even if the section 15 claim **was to** proceed it was bound to fail.

28. The claimant sought to establish he was treated unfavourably i.e dismissed because of something arising in consequence of his disability. The respondents contended that given the findings in fact made in the Judgment in relation to dismissal the Tribunal would be bound to find that any such unfavourable treatment was objectively justified (section 15(1)(9)(b) EqA. Mr. Hawthorn argued that, a different Tribunal might come to different conclusions and there was no legal basis to say that future Tribunals were bound by these findings. Mr. Nichol respectfully disagreed as 'findings" were "findings".

29. Mr. Nichol then turned to time bar. The Tribunal was entitled to look at these matters. The claims were "years" out of time. He made reference to the cases of **Robertson v Bexley** Community **Centre** [20031 EWCA Civ to 536, **British Coal Corporation v Keeble** [1997] IRLR 336, **DPP v Marshall** [19981 IRLR 494 and finally to **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23. As an alternative to strike out/time bar the representative's solicitor indicated that a Deposit Order should be made. Mr. Hawthorn at this point indicated that the claimant was on state benefits. I observed that the Tribunal was entitled to take into account the claimant's entire financial position, and he might wish to take instructions in relation to the claimant's capital position and email the Tribunal that information should he choose to do so.

30. Mr. Hawthorn's position was that any act of discrimination would revive earlier acts. There was here a course of conduct that had to be looked at. The Tribunal shouldn't get too 'hung up on individual acts". He accepted the last act of harassment by Mrs. Kelly was some considerable time before the claimant's dismissal and before the raising of any action but in his

submission that was not sufficient for time bar to operate and to say that the claims had no reasonable pros s of success. The respondent s case managers had acted in such a way as to delay the claimant's recovery from illness. This was a course of conduct although it might not be the same Manager involved. I queried with Mr. Hawthorn the terms of paragraph 34 that dealt with an application by the claimant for an internal job in the Cash Department. "The claimant was told by his Line Manager that he had been instructed by the Head of Administration to tell the claimant that he was not allowed to apply for promotion because he was subject to the "poor performance regime." I queried what type of discrimination was being alleged and that the instruction related to non-disabled people then could it be said to relate to the claimant's disability. Mr. Nichol indicated that the respondent's position led in evidence was that there was no such bar ever put in place to prevent the claimant making an application but, in any event, this would not amount to direct discrimination in his submission.

Discussion and Decision

31. I will deal with the question of amendment first of all. The claimant seeks to amend his application to include claims for disability discrimination (section 15) and harassment.

32. The Tribunal has wide powers of amendment. The starting point for the Tribunal is the 'Overriding Objective" in Rule 2 which provides:

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.

Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking tility in the pn igs

(d) avoiding delay, so far as compatible with proper const ie>ati m of the issues; and

(e) saving expense.

33. A Tribunal must seek to give effect to the overriding objective in interpreting, or exercising any power given to it in the Rules. In the context of applications to amend the Tribunal should have regard to the case of **Selkent Bus Company Ltd** v **Moore** [1996] IRLR 661 (which was followed by the EAT in Scotland in **Amey Services Ltd and another v** Aldridge **and others UKEATS/0007/16).** The EAT held that, when faced with an application to amend, a Tribunal must carry out a careful balancing exercise of ail the relevant circumstances, weighing up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application. This would inchjde the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

34. In this case the amendment purports to introduce claims which appear clearly time barred. The time limit for a discrimination claims to be presented to a Tribunal is 3 months starting with the act complained of (section 123(1). 25 Equality Act 2010). Section 123(3)(a) of the Equality Act 2010 provides for continuing acts of discrimination, where acts of discrimination extend over a period are treated as having occurred at the end of that period. The question a Tribunal should ask in such circumstances is whether the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (Hendricks v Metropolitan Police **Commissioner** [2002] EWCA Civ 1686). There must **be** facts and circumstances which are 'inked to one another to demonstrate a continuing discriminatory state of affairs. The Tribunal should consider the nature of the conduct and the status or position of the person responsible for it. In the

present case the last act of discrimination might have been the dismissal which took place on the 16 March 2015

35. The Tribunal has the power to grant a just and equitable extension of time if a claim is out of time. It can allow a late claim to be presented in such further period as it considers just and equitable (section 123(1)(b)). In the case of British Coal Corporation v Keeble & Others [1997] IRLR 33 sets out a checklist of factors which a Tribunal should consider when deciding whether to refuse or grant an application to extend the time limit. These are: a) The iength of and reasons for the delay, b) The extent to which the cogency of the evidence is likely to be affected by the delay, c) The extent to which the party sued had co-operated with any requests for information, d) The promptness with which the Plaintiff acted once he or she knew of the facts giving rise to the cause of action, e). The steps taken by the Plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

36. In the case of Mensah v Royal College of Midwives UKEAT/1 24/94, Mummery J said that knowledge is a factor relevant to the discretion to extend time. Tribunals are therefore entitled to ask questions about a claimant's prior knowledge including: when did the claimant know or suspect that they had a claim for discrimination; was it reasonable for the claimant to know or suspect that they had a claim earlier; and if they did know or suspect that they had a claim, why did they not present their complaint earlier.

37. It is useful to note that amendment is often granted where it can be argued that the ET1 contains facts which support the amended claim and that the exercise is one of "re-labelling"

38. It is useful to consider the history of this case and what was pled. The alleged "bullying" carried out by Mrs. Kelly in 2013. The new information that Mr. Hawthorn alludes to is the confirmation that Mrs. Kelly took advice from her line manager about the steps being taken to get the claimant back to work. It would not have been difficult to envisage that she would also have discussed or had raised with her the pressure the service was under to properly staff courts. Parties did not have a copy of the grievance raised

against Mrs. Kelly but fortunate / this was considered at the evidential hearing in 2016 and I did not at the time of the hearing have haa access to those papers but have now refreshed my memory having looked at the original Bundles that were lodged.

39. The claimant met Mrs. Kelly on the 17 January 2014 He was told that Mrs. Kelly accepted that the reasons for his absences were genuine but there was a discussion as to what more the respondents could do after making temporary adjustments to his role and being unable to find alternative work. I noted that paragraph 52 of the ET1 was in the following terms:

> "Following the meeting on 17 January 2014, the claimant discussed what had happened to him with a friend who is a lawyer. The friend investigated the law in relation to disability discrimination under the Equality Act 2010 and outlined to the claimant some of the rights given to him as an employee under that act and the duties imposed on the respondent under that act. This was when the claimant first became aware, in general terms, of the significance of the references to disability in the reports by the respondent's occupational health advisers."

40. The claimant's grievance very broadly related to what he thought was bullying by his manager through her manner and by requiring him to try and get back to work in courts This matter was investigated, and a report prepared. The grievance was adjudicated upon by David Shand the Business Manager and the line manager of Ms. Kelly. In paragraph 53 of the ET1 there is reference to his involvement and to a SAR request made by the claimant seeking to disclose his involvement. It seems to me that it must have been either clear or strongly suspected that the Business Manager to whom Ms. Kelly reported must have been aware of the claimant's case. The claimant rejected the report and the Business Manager's decision (paragraph 60). He found it 'unexpected and devastating".

41. The first matter to consider is whether this is a re-labelling exercise. It seems clear that it is not Can it be said that it was the evidence of Mrs. Kelly in 2016 that prompted the amendment and not earlier given the claimant's state of

knowledge? The amendment argues that N Shand te ing the of* mant he might be dismissed was victimisation Tribunals have often complained that ill beaith provisions that refer to c " n< y action are insensitive but warning the claimant that continued absences might lead to his dismissal is ultimately an objective warning and it is difficult to see how it was, alone, enough to constitute a detriment or motivated not by the absences but by disability discrimination. If the claimant regarded this as victimisation then why was it not in the original claim? It did not need to wait until Mr. Shand's role became apparent or I should say more apparent.

42. I am not sure that I agree with Mr. Nichols observation that it impossible to see how the requirements of section 15 can be satisfied. That section was designed to provide those who are disabled with relatively wide scope to engage the section. Its focus is often on the symptoms occasioned by the condition and this arguably includes absences related to the condition. However, even if the section is engaged the requirement to be able to work in courts and keep good attendance provides a defence under section 15 (1) (b).

43. Even if it was accepted that the amendment could only have been considered after the evidence heard in 2016, which I do not accept, then Mr. Nichol's point that it comes "very very' late in the day and that there was no reason if the matter was seen to be so significant that the amendment could not have been proposed immediately after the that hearing. I agree that the Tribunal may not have dealt with any amendment until the appeal was determined but there was no reason why it could not have been lodged at that point giving the respondent notice. I am not sure that pleading that Mrs. Kelly's line manager was the controlling mind behind what happened assist the claimant. His claim is against the respondents and their actions which either amount tom proper claims or not irrespective of how they arose.

44. Allowing an amendment is an exercise is discretion. A balancing exercise must be carried out. The claims being advanced are problematical for the reasons we have discussed. However, the strongest two elements here are that the claims that the amendment seeks to introduce are time barred by

some years and the secondly, connected to the question of the question of time bar is whether realistically we can have a fair trial of the issues almost 8 years from the events at issue.

45. The primary statutory rime limit, three months after the act or omission complained of, has been set by Parliament although that time limit is subject to earlier events being revived if there is a continuing course of conduct or state of affairs. In the case of **Bexley Community Counci!** the court indicated that exercising discretion and allowing a late claim would be the exception rather than the rule. Allowing the amendment, problematical as it is, would cause the respondent considerable difficulty (and expense) in conducting the proceedings and would place difficult burden on witnesses asked to recollect events that far in the past. I also have some doubt that even if allowed the proposed new claims add much to the current pled case. **In** short principal factors are that the amendment comes too late and it is accordingly refused.

46. The respondents sought under Regulation 37 of the Employment Tribunals Rules of Procedure 2013 a strike out of the claim on the basis that it had no reasonable prospects of success. The powers of the Tribunal are set out in that Rule which is in the following terms:

Striking out

37.— (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 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:

(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).

47. It has been observed that the power of strike out is a draconian one and should only be exercised in rare circumstances. The effect of a successful strike out application would be to prevent a party proceeding to a hearing and leading evidence in relation to the merits of their claim. (Balls **v** Downham **Market High School & College [20111 IRLR 217 EAT).**

48. As a general principle discrimination cases should not be struck out except in very clear circumstances and the cases in which such claims are struck out before the full facts could be established are rare (Chandhok & others v **Tirkev [20151 IRLR 195** EAT).

49. In the alternative it was submitted that the claim has little reasonable prospect of success and that a Deposit Order should be made if the case is not struck out. The test is not as rigorous as "no reasonable prospect of success''. The Tribunal's power to order a Deposit Order of up to £1000 for each specific **allegation** or argument **(Doran v Department of Work and Pensions UKEAT ES/0017/14, Van Rensburg v The Royal Borough of Kingston Upon Thames and others UKEAT/0096/07 and UKEAT/0095/07. Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0133/14**

50. The Mr. Nichol argued that the extant claims had no reasonable prospects of success. The first claim relates to alleged harassment by Mrs. Kelly. The difficulty the claimant faces is that what he characterises as harassment are mostly the attempts by Mrs. Kelly to try and get the claimant back to his full range of duties. At face value these appear anodyne matters but the history of the matter shows that they were ultimately unsuccessful and it is perhaps understandable that the claimant has come to feel that he was put through the stress of complying with the attempts ultimately to no good effect. The hearing that took place and which considered many days of evidence was

designed by parties to get the heart of the case namely fra ue of adjustments. However, the findings made in that exercise have an impact on the remaining claims which to be fair were not in focus at that hearing. Mr. Hawlhom argued that a future Tribunal could depart from those findings. I cannot see how that can be so. This is one litigation although an incomplete one.

51. The policy of the finality of litigation principal must apply to these findings otherwise and issue could be revisited again and again in the same litigation as different legal claims are addressed with the attendant cost and confusion that would cause. My conclusion is that the claimant has to live with the findings made and Mr. Nichol is correct that those findings made the claimant's task of proving victimisation a very difficult one. It can be summed up in the finding at page 144 that Mrs. Kelly was at all times patient and supportive of the claimant and later that she tried her best to get the claimant back to work or redeployed. Against this background the claim for harassment has no reasonable prospects of success and is dismissed.

52. In addition, the submission that the claim is time barred is also well founded in circumstances where the ciaimant had no contact with Ms. Kelly for over a year before his dismissal and the raising of proceedings by him.

53. Similarly, the claim for direct discrimination is undercut by the findings of the earlier Judgment. The actions complained of must be because of the disability itself and not. as here, because of absences and lack of alternative roles. That claim too must be struck out as having no reasonabie prospects of success.

54. I understand that the witnesses, although Mrs. Kelly for example has retired, are still able to attend as witnesses. Factors which might engage that rule were canvassed when the amendment was discussed and the prospect of leading evidence about incidents in 2013 was discussed.

55. However, for clarity I was not addressed on the terms of Section 37 (e) and consequently it is not part of my decision.

Employment Judge: J Hendry
Date of Judgment: 14 July 2022
Entered in register: 14 July 2022
and copied to parties

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