EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112526/2021

Open Preliminary Hearing (OPH) in Edinburgh on 1 July 2022

Employment Judge: A Strain (sitting alone)

Mr C G d Oliveira	Claimant **Represented by:** Self
The City of Edinburgh Council	Respondents **Represented** by: **Ms K Sutherland -** Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:

1. the application to amend the claim is refused; and

2. all of the Caimant's claim is struck out under Rule 37(1)(a) of the Employment Trunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that the claim has no reasonable prospect of success.

Background

1. The Claimant presented his ET1 on 28 November 2021. The Claimant asserted claims of race discrimination and detriment following protected disclosures.

2. The Respondent denied that the Claimant had been subject to detriment, made protected disclosures or discriminated against on the grounds of his race in their ET3.

3. The Claimant submitted a PH Agenda in advance of the PH which took place on 24 January 2022. He confirmed at that PH he wished to pursue

claims of Direct and Indirect Discrimination and Victimisation on the grounds of his race in addition to the protected disclosures detriment claims. He also stated that he wished to make an age discrimination claim.

4. The tribunal ordered the Claimant to provide further and better particulars of his race discrimination and protected disclosures claims. The tribunal also informed him that if he wished to introduce an age discrimination claim he would need to do so by amendment.

5. The Claimant provided additional information in response to the tribunal case management orders under cover of an email of 16 February 2022. That email also sought to amend the Claim by adding in a claim of age discrimination relying on an age group of 45-54.

6. A further PH took place on 7 April 2022. The tribunal clarified the Claimants various whistleblowing detriment, direct race discrimination, indirect race discrimination and age discrimination claims as detailed in pages 57 - 60 of the PH Note. The tribunal identified in that Note what were existing complaints (those raised in his ET1) and what were new complaints (not raised in his ET1).

7. The tribunal noted at paragraph 29 of the Note that it would treat the Claimant's email of 16 February 2022 and additional information attached as an application to amend his claim to include the following additional complaints :

a. Whistleblowing detriment in respect of an email of 24 January 2022;
b. Victimisation in respect of the email of 24 January 2022;
c. Direct age discrimination regarding failure to report/dismiss discovered on 8 October 2021 .

8. The Respondent made an application for strike out (failing which a deposit order) by email of 28 April 2022. The application was on the basis

that the Claimant's claims of detriment due to protected disclosures and direct race discrimination had no reasonable prospect of success.

9. The tribunal granted the Claimant's application to amend to include complaints of detriment on account of whistleblowing on 14 November 2021 and victimisation on account of bringing proceedings for race discrimination on 28 November 2021 on 11 May 2022. His application to amend to include the complaint of direct age discrimination was to be determined at an OPH fixed for 1 July 2022 along with the Respondent's existing application for strike out (which failing deposit) and the application to follow in respect of the amended claims.

10. The Claimant responded to the strike out application by email of 19 May 2022.

11. The tribunal had to determine the following issues at the OPH:

Strike Out

1. Whether the undernoted claims had no reasonable prospect of success:

    a. The claim under section 47B of ERA 1996 that the Claimant made protected disclosures on 14 November 2021 and was subject to a detriment by the failure of the Respondent to report certain employees to the SSSC and by the Respondent's failure to dismiss these employees allegedly covering up events of 12 September 2020 thereby-

    b. The claim under section 13 of EA 2010 that he was discriminated against on the grounds of race by the Respondent's failure to report certain employees to the SSSC and by the Respondent's failure to dismiss these

employees thereby covering up the events of 12 September 2020;

c. The claim under section 47B of ERA 1996 that the Claimant made protected disclosures on 14 November 2021 and was subject to a detriment by the decision to investigate his SSSC status and by the manner in which the issue with his status was raised with him by email of 24 January 2022;

d. The claim under section 27 of EA 2010 that he was victimised following raising his claim under EA 2010 by the decision to investigate his SSSC status and by the manner in which the issue with his status was raised with him by email of 24 January 2022.

Deposit Order

2. In the alternative, whether the claims referred to in 1 above had little reasonable prospect of success. If so, what would be an appropriate amount of deposit to order?

Amendment

3. Whether the Claimant should be allowed to amend his claim to include the claim of direct age discrimination;

4. Whether the direct age discrimination claim was time barred under section 123(1)(a) of EA 2010;

5. If it was time barred, whether it would be just and equitable to extend the time for him to bring this claim under section 123(1)(b) of EA2010.

12. The Parties had lodged an agreed Joint Bundle of Documents with the Tribunal.

13. The Claimant represented himself and made submissions on his own behalf. He made reference to authorities in support of his submissions *(R Gourlay v Dundee Science Centre 4110508/2019; Onyia v Maryfield West Care Home 4107643/2021 ; J Shaw v Lothian Health Board 4107618/2019; N Falenta v Heriot-Watt University 4112631/2018; C Roland! v Crieff Hydro Limited 4107789/2020; L Kashina v City of Edinburgh Council 4103132/2019; N Glenn v HOKO Design Limited 4108776/2021).*

14. The Claimant's submissions focused on the fact that he was a party litigant. Under reference to the authorities referred to the Claimant submitted that it was only in the clearest of cases that strike out should be granted in discrimination/whistleblowing cases involving a party litigant. He referred to each of the claims and submitted that there was sufficient in each to merit the case proceeding to a hearing.

15. In so far as the amendment was concerned, the prospect of an age discrimination claim had only occurred to him when he completed the PH Agenda and he considered the questions asked in the pro forma. He had tried unsuccessfully to obtain advice from CAB. Whether or not to allow the amendment was a matter for the tribunal's discretion and, in his submission, that discretion should be exercised in his favour. He submitted that it would be just and equitable in the circumstances to extend the time limit and allow the amendment introducing the age discrimination claim. There would be prejudice to him if it were not allowed in that he would lose the ability to pursue this claim. Granting the amendment would be in accordance with the overriding objective.

16. The Respondent was represented by Ms K Sutherland, Solicitor who lodged written submissions which were spoken to by her.

17. In essence, the Respondent's solicitor broke down each claim and submitted that taking each case at its highest each of the claims had no

prospect of success (relying on Cox v Adecco and others 2021 ICR 1307).

18. In so far as the amendment was concerned the Respondent submitted (under reference to ***Selkent Bus Company Ltd v Moore [1996] IRLR 661)*** this was significantly out of time, could and should have been presented earlier and sought to introduce a new claim which, taking it at its highest, had no reasonable prospect of success. There would be prejudice to the Respondent in having to respond to such claim, there would be further adjustment to the pleadings, additional investigation, time and expense in dealing with it. This far outweighed any prejudice to the Claimant. Refusing the amendment would be in accordance with the overriding objective.

Preliminary Issues

19. The Claimant opposed the inclusion of an email exchange with Pat Brack (pages 155-161 of the Bundle). The basis of this objection was that the Respondent had a duty of care under the Data Protection Act 1998 not to disclose medical information without his consent The email exchange referred to made reference to the Claimant attending his GP, receiving counselling and suggested a referral to occupational health.

20. The Respondent's position was that the inclusion of this email exchange was necessitated as a consequence of the Claimant raising the issue of his SSSC registration in the Claim.

21. The tribunal considered the position and determined that the emails should be included as they were directly relevant to the matters raised in the Claim.

22. The Respondent then sought to amend their ET3. Their application had been made by email and copied to the Claimant on 16 June 2022. The Respondent submitted that the ET3 had simply been updated tn light of the additional information provided by the Claimant and his amendment. The Claimant opposed this application as detailed in his email to the

tribunal of 20 June 2022. The basis of his opposition was that this was the 2nd or 3rd time the Respondent had sought to amend their response and that this was a "new application".

23. The tribunal reserved its position and allowed the hearing to proceed.

The Relevant Law

Strike out

24. The EAT in the case of Cox **v Adecco and Others 2021** ICR **1307** provide guidance and endorse the approach of Choudhury J, on the state of the law on strike out in the case of party litigants in Malik v **Birmingham** City Council **UKEAT/0027/19.**

25. The Equal Treatment Bench Book (Chapter 1) gives context to the approach to be taken in in the case of party litigants.

26. The following general propositions are gleaned from these cases:

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair

assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer; (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

27. In discrimination and whistleblowing it's only the clearest cases that should be struck out.

28. Where material facts are in dispute which could only be determined by an evidential hearing the claim should not be struck out - Kaur v Leeds **Teaching Hospitals NHS Trust 2019 ICR 1.**

Detriment under section 47B of ERA 1996

Qualifying protected disclosure

29. In terms of sections 43B - 43H of the Act to be a qualifying protected disclosure the Claimant needs to satisfy the Tribunal that:

(a) There was a disclosure of information;

(b) The subject matter of this disclosure related to a "relevant failure";

(c) It was reasonable for him to believe that the information tended to show one of these relevant failures;

(d) He had a reasonable belief that the disclosure was in the public interest; and

(e) the disclosure was made in accordance with one of the specified methods of disclosure.

Disclosure of information (section 43B(1))

30. The Employment Appeal Tribunal in the case of *Cavendish Munro* ***Professional Risks Management Ltd v Geduld 2010 ICR 325*** provide guidance to the Tribunal highlight a distinction between "information" and an "allegation". The EAT held the ordinary meaning of "information" is conveying facts". *Kilraine v London Borough* ***of Wandsworth [201 B]*** *EWCA Civ 1436, CA* highlights a distinction between "information" and an "allegation". The Court of Appeal in *Kilraine* noted that there can be a distinction between *"information"* (the word used in ERA 1996 s.43B(1)) and an "a//egat/on". However, the concept of *"information"* as used in ERA 1996 s.43B(1) is capable of covering statements which might also be characterised as allegations.

There must be a Qualifying Disclosure (section 43B(1)(a-f))

31. A "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

32. This requires the Tribunal to consider whether or not the disclosure was (in the reasonable belief of the Claimant) (i) in the public interest and (ii) showed one or more of the matters contained within section 43B(1)(a-f).

Reasonable Belief

33. It is the Claimant's belief at the time of disclosure that is relevant and it is not necessary for the Claimant to prove that the infoirmation disclosed was actually true *(Darnton v University of Surrey 2003 IRLR 133).* The Tribunal must assess the Claimant's belief on an objective standard *(Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4).*

34. The EAT in *Phoenix House Ltd v Stockman and anor 201 6 IRLR 848* give further guidance on the approach to be adopted : "on *the facts believed to exist by an employee, a judgment must be made as to whether or not, first, that belief was reasonable and, secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints"*

Public Interest

35. The approach to be adopted by a Tribuna! in considering whether a disclosure was in the public interest was as set out.by the Court of Appeal in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979.* The Tribunal should determine whether the employee subjectively believed at the

time of the disclosure that disclosure was in the public interest. If it was then the Tribunal should ask whether that belief was objectively reasonable.

Disclosure must be made to person specified in section 43C to H.

36. In order to be a protected disclosure the Tribunal must consider to whom the disclosure was made and whether they fell within sections 43C-H.

Detriment

37. The case of Shamoon v Chief Constable RUC [2003] IRLR 285 gives some guidance on what constitutes a detriment. The tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

38. But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Lord Brightman. As he put it in *Ministry of Defence* v *Jeremiah* [1980] QB 87, 104B, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": *Barclays Bank pic* v *Kapur and others (No 2)* **[1995] IRLR** 87.

Direct Race Discrimination

39. Direct discrimination occurs where *"because of a protected characteristic, A treats B less favourably than* A *treats or would treat others"* (section 13(1), EA 2010).

40. The less favourable treatment must be because of a protected characteristic. This requires the tribunal to consider the reason why the claimant was treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment?

41. The tribunal will need to consider the processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

42. If the treatment of B puts them at a clear disadvantage compared with others, then it is more likely that the treatment will be less favourable.

43. There must be no material difference between the circumstances of B and the comparator (section 23(1), EA 2010).

Burden of Proof

44. A two-stage approach to the burden of proof applies [Royal Mail Group Ltd v Efobi [2021] UKSC 33]:

45. Stage 1: can the Claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the Respondent.

46. Stage 2: is the Respondent's explanation sufficient to show that it did not discriminate?

47. The burden will shift where there are facts from which a tribunal could decide, in the absence of any other explanation that a breach has occurred. In that situation a respondent is required to show a non-discriminatory explanation for the primary facts on which the prima facie case is based [Glasgow City Council v Zafar [1998] IRLR 36 (HL)].

Victimisation

48. Section 27(1) of the EA 2010 provides:

Victimisation occurs where a person. (A) subjects another person (B) to a detriment because either:
B has done a protected act.
A believes that B has done, or may do, a protected act.

49. Section 27(2)(a) provides that bringing proceedings under the EA 2010 is a protected act.

50. Section 27(2)(d) provides that alleging (whether or not expressly) that another person has contravened the EA 2010 is a protected act.

51. Victimisation may be established where an employee is subjected to a detriment "because" the employee has done (or might do) a protected act.

52. Victimisation need not be consciously motivated. If A's reason for subjecting B to a detriment was unconscious, it can still constitute victimisation **[Nagarajan v** London Regional Transport and others **[1999] IRLR** 572].

53. A protected act need not be the main or only reason for the treatment: victimisation will occur where it is one of the reasons (paragraph 9.10, EHRC Services Code).

54. However, the protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason.

Amendment

55. The Claimant seeks to amend his application to include a claim for age discrimination which is a new ground of claim.

Overriding Objective

56. The starting point for the Tribunal in considering any such application is the "overriding objective" which provides:

> *Overriding objective*
>
> 2. The overriding objective of these Rufes is to enable Employment Tribunate 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 flexibility in the proceedings;
>
> (d)avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e)saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal. •

Applications to Amend

57. 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 ***Arney 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 include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

Time limits

58. In this case the amendment purports to introduce claims which may be time barred. The time limit for a discrimination claim to be presented to a Tribunal is 3 months starting with the act complained of (section 123(1), 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 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 linked 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.

Just and equitable extension of time

59. If a claim is out of time the Tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b)).

60. ***British Coal Corporation v Keeble & Others [1997] IRLR 336*** 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:

a. The length 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.

Knowledge of the Claimant

61. 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.

Discussion and Decision

Preliminary Issue

62. The tribunal considered the Respondent's application to amend. The amendment sought to update, answer and address the issues raised by the Claimant The tribunal carried out a careful balancing exercise of all the relevant circumstances, weighed up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application. This included the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

63. Having done so, the tribunal considered that allowing the amendment was in accordance with the overriding objective. The amendment clearly responded to the claims advanced by the Claimant and updated the Respondent's pleadings. The Claim was at OPH stage. It had not yet reached a final hearing. The Respondent would clearly be prejudiced if the amendment were not to be allowed. The tribunal did not consider there to be any prejudice to the Claimant in alowing the amendment. The Claimant would be afforded the opportunity to respond to the Respondent's amendment if he wished to do so.

Strike out

64. The tribunal then considered the application by the Respondent for strike out in respect of each of the claims.

a. *The claim under section 47B of ERA 1996 that the Claimant made protected disclosures on 14 November 2021 and was subject to a detriment by the failure of the Respondent to report certain employees to*

the SSSC and by the Respondent's failure to dismiss these employees allegedly covering up events of 12 September 2020 thereby.

65. The Claimant's position was that on 14 November 2021 he made a submission to Safecall that a number of named employees had not been reported to the SSSC and were still working for the Respondent notwithstanding events on 12 September 2020 (Pages 152-154). This was the protected disclosure relied upon.

66. Evidently, the fact that the Claimant and other named employees were not reported to the SSSC or dismissed following events on 12 September 2020 cannot amount to a detriment suffered by the Claimant. None of the employees (including the Claimant) were subject to anything that could be said to constitute a detriment.

67. The claim by the Claimant is also unsustainable on the basis that he alleges he was subjected to a detriment after making his protected disclosure on 14 November 2021. The alleged failure to report to SSSC or dismissal occurred prior to the protected disclosure so he could not possibly be subject to a detriment by that failure. The claim is misconceived in that respect.

68. The tribunal were conscious of Cox v Adecco and Others 2021 ICR 1307 and the EAT's guidance on dealing with cases involving party litigants. Taking the claim at its highest and accepting the factual basis for it, the tribunal considered that it was a truly hopeless claim which had no reasonable prospect of success in the circumstances.

69. The tribunal accordingly struck out the claim.

b. The claim under section 13 of EA 2010 that he was discriminated against on the grounds of race by the Respondent's failure to report certain employees to the SSSC and by the Respondent's failure to dismiss these employees thereby covering up the events of 12 September 2020.

70. The Claimant again relies upon the alleged failure to report to SSSC and dismiss the named employees following the events of 12 September 2020.

He asserts that if he or someone from his racial group (Brazilian Latino) had been in the same circumstances as the named employees (whom he asserted were white British comparators) then he would have been reported to the SSSC and dismissed. This, he submitted, was less favourable treatment.

71. As a matter of undisputed fact the Claimant had not been reported to the SSSC or dismissed. He had not been treated differently to his chosen comparators. His claim of direct discrimination under section 13 could not succeed in the circumstances and was misconceived. Taking the claim at its highest and accepting the factual basis for it, the tribunal considered that it was a truly hopeless claim which had no reasonable prospect of success in the circumstances.

72. The tribunal accordingly struck out the claim.

c. *The claim under section 47B of ERA 1996 that the Claimant made protected disclosures on 14 November 2021 and was subject to a detriment by the decision to investigate his SSSC status and by the manner in which the issue with his status was raised with him by email of 24 January 2022.*

73. Accepting that the Claimant's submission to Safecall on 14 November 2021 was a protected disclosure the Claimant must establish that the Respondent's email to him of 24 January 2022 (Pages 155-6) somehow constituted a detriment as a consequence of him making that disclosure. The tribunal referred to the case of **Shamoon** v **Chief Constable RUC [2003] IRLR 285.** The tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

74. The Claimant accepted that he did not have the correct SSSC registration and that SSSC registration was a requirement for him to work for the Respondent. He considered the request to have been motivated by his disclosure of 14 November 2021 as he had been in post since November 2020 and his SSSC registration had not been investigated before then.

75. Given it was accepted that SSSC registration was a requirement for the post the tribunal cannot see how the Respondents email can be said to constitute a detriment in the circumstances. Even if it were to have been motivated by the disclosure the Claimant was not subject to a detriment by the act of raising the issue of his SSSC registration with him. The claim is clearly misconceived.

76. Taking the claim at its highest and accepting the factual basis for it, the tribunal considered that it was a truly hopeless claim which had no reasonable prospect of success in the circumstances.

77. The tribunal accordingly struck out the claim.

d. The claim under section 27 of EA 2010 that he was victimised following raising his claim under EA 2010 by the decision to investigate his SSSC status and by the manner in which the issue with his status was raised with him by email of 24 January 2022.

78. The Claimant accepted that he did not have the correct SSSC registration and that SSSC registration was a requirement for him to work for the Respondent. He considered the request to have been motivated by his raising this tribunal claim on 28 November 2021 .

79. For his victimisation claim under section 27 of EA 2010 to succeed the Claimant would need to establish that he suffered detriment because he brought the current tribunal proceedings.

80. Given it was accepted that SSSC registration was a requirement for the post the tribunal cannot see how the Respondent's email can be said to constitute a detriment in the circumstances. Even if it were to have been motivated by the bringing of the current tribunal proceedings the Claimant was not subject to a detriment by the act of raising the issue of his SSSC registration with him. The claim was misconceived.

81. Taking the claim at its highest and accepting the factual basis for it, the tribunal considered that it was a truly hopeless claim which had no reasonable prospect of success in the circumstances.

82. The tribunal accordingly struck out the claim.

83. Having struck out all of the claim the tribunal did not need to consider the application for a deposit order.

Amendment

84. The Claimant seeks to amend his application to include a claim for age discrimination which is a new ground of claim. This application was made on 16 February 2022 (Page 107). He included further particulars on the same date (Page 115). He asserts that the less favourable treatment was the Respondent's failure to report named employees to the SSSC and the failure to dismiss them following the events of 12 September 2020.

85. The factual basis for this claim is (in the main) the same as the factual basis for the claims (a) and (b) above other than it is now alleged that the less favourable treatment, is due to his age.

86. The Claimant asserts that if he or someone from his age group (45 to 54) had been in the same circumstances as the named employees (whom he asserted were in the age group of over 66 and comparators) then he would have been reported to the SSSC and dismissed. This, he submitted, was less favourable treatment.

87. The tribunal had due regard to the case of *Selkent Bus Company Ltd v Moore [1996] IRLR 661* and also the overriding objective. The tribunal once again took into account the fact that the Claimant was a party litigant and had not had the benefit of legal advice.

88. As a matter of undisputed fact the Claimant had not been reported to the SSSC or dismissed. He had not been treated differently to his chosen comparators. He had not been subject to less favourable treatment. His claim of direct discrimination under section 13 could not succeed in the hypothetical circumstances he asserted. Taking the claim at its highest and accepting the factual basis for it, the tribunal considered that it was a truly hopeless claim which had no reasonable prospect of success in the circumstances.

89. Furthermore, the discriminatory act relied upon is the failure to report or dismiss the named employees following events of 12 September 2020. The claim is accordingly significantly out of time. Even if the tribunal accepted and found that the Claimant did not become aware of the alleged discriminatory act until 8 October 2021 he did not put forward the age dicrimination claim until he applied to amend on 16 February 2022. The claim would still have been out of time.

90. Whilst the tribunal has discretion whether or not to extend time limits on just and equitable grounds the tribunal considered that it would not do so in the circumstances of this case where the proposed amendment sought to introduce a truly hopeless case which had no reasonable prospect of success.

91. The Tribunal also considered that there would be considerable prejudice to the Respondent in allowing the amendement given it would introduce a truly hopeless claim which had no reasonable prospect of success in the circumstances. The Respondent would be put to considerable time and expense in responding to the claim.

92. The appplication to amend is accordingly refused.

Employment Judge: A Strain
Date of Judgment: 08 August 2022
Entered in register: 09 August 2022
and copied to parties