EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102914/2016

Hearing held by telephone conference call (in public) on
10 **20 December 2022**

Employment Judge McFatridge

15 **Mr E Borland**	**Claimant** **In person**
Fife Council	**Respondent** 20 **Represented by:** **Ms Macara,** **Solicitor** **Instructed by** **Mr Murray,** 25 **Fife Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's claim has no reasonable
30 prospect of success and the claim is struck out in terms of Rule 37(1)(a) of the
Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. In 2016 a multiple claim was submitted on behalf of the claimant and
35 others who asserted that their right to equal pay had been infringed by the
respondent. The claim was submitted by a firm of solicitors. The
respondent submitted a response in which they denied the claim and

thereafter the claim was subject to a considerable amount of case management. In 2020 a hearing took place to determine whether or not the job evaluation scheme which the respondent relied on as part of their defence was a valid job evaluation scheme pursuant to section 131(5)(b) of the Equality Act 2010. This question was answered in the affirmative by the Tribunal in a judgment issued in December 2020. In or about August 2021 the solicitors acting for the claimant indicated that they were withdrawing from acting for a number of claimants including the claimant. In accordance with the usual Tribunal practice these claimants were written to asking whether they wished to withdraw their claims or whether they wished to continue with the claim either representing themselves or appointing other agents. In this case the claimant indicated he wished to continue with his claim representing himself. Initially the claimant attended various case management preliminary hearings which dealt with the remaining claims in the multiple as well as his own however from around March 2022 onwards the claimant's claim was managed individually. It should be noted that following the original solicitors withdrawing from acting for the claimant and a number of others in August 2021 these solicitors are still pursuing a claim on behalf of a number of the original claimants who are maintaining an argument that the job evaluation scheme was, although valid, based on a system which discriminates because of sex or is otherwise unreliable in terms of section 131(6)(a) and (b). A hearing is to be held to determine that issue in early 2023.

2. Once the claimant's claim started being case managed on its own it became clear that, in the claimant's mind at least, his claims were not based on the same arguments as set out in the original pleadings lodged on behalf of himself and others in 2016. Various attempts were made by the Tribunal at various case management hearings to have the claimant specify his claims in sufficient detail that they could be understood and dealt with. Following this process the respondent argued that in effect the claimant was trying to completely amend his claim and pursue a new claim which was entirely different to the claim lodged on his behalf by solicitors in 2016. A preliminary hearing took place on 26 July 2022 which held that the claimant's application to amend his claim was refused. This judgment

is referred to for its terms as within it, it sets out what the Tribunal understood at the time to be the claims now being made by the claimant.

3. Subsequent to this the respondent applied for strike out of the claim. It was their position that as matters stood the claimant was not in a position to pursue the claims set out in his original 2016 claim. Given that his application to amend had been refused these were the only claims before the Tribunal. It was their position that that claim had no reasonable prospect of success. A preliminary hearing was fixed in order to deal with the application. It was due to take place by CVP. The claimant had successfully participated in the CVP hearing in July 2022. Unfortunately a few days before the hearing the claimant indicated that he no longer had the app which had allowed him to participate previously in a CVP hearing. The CVP test which was organised was unsuccessful. The claimant was offered the possibility of attending a hearing in person at the Tribunal's Dundee hearing centre however he indicated that due to various long-standing health issues he would not be in a position to attend the hearing centre. The claimant suggested that he would be able to take part in a telephone hearing. I canvassed the idea with the parties and both parties were in agreement with this. I considered it to be in accordance with the overriding objective to hold the hearing on the telephone. Although held on the telephone the hearing was public in the sense that any member of the public who contacted the Tribunal requesting access would have been given listening only access to the telephone call. In the event, no-one applied.

4. At the hearing the respondent made an oral submission which was based on a skeleton argument which had been forwarded to the Tribunal and the claimant shortly beforehand. The claimant then made an oral submission. I then allowed the respondent's representative the opportunity to comment on this and then finally allowed Mr Borland the last word. I will summarise the parties' submissions below.

Respondent's submission

5. The respondent's representative based her submission on the skeleton argument which was lodged. This is a fairly full document which is referred to for its terms. The respondent's representative sets out the history of the matter. The key point is that given that the claimant's application to amend the pleadings was refused the claim being made to the Tribunal by the claimant is that set out by his original solicitors. This claim is drafted from the perspective of a female claimant although nothing turns on this. The claim is set out in a paper apart attached to the ET1 claim forms and in the further and better particulars of claim entitled "Order of Employment Tribunal 31 August 2016." This document was lodged as pages 18-23 in the joint bundle of documents prepared for the amendment hearing in July 2022. The most recent list of comparator posts was set out on page 20-21 and also in the respondent's submission. It was the respondent's position that Tribunal required to consider whether or not this claim had any reasonable prospect of success. It was their position that it had no reasonable prospect of success because the claimant had not provided any valid comparators for the claims of work rated as equivalent or work of equal value. The claimant had accepted that during the course of his employment he was graded FC3. In order to have any reasonable prospects of success the claimant would require to show that a female in a role listed as a comparator at grade FC3 or below was paid more than him and that this difference in pay was related to his sex. It was the respondent's position that the claimant had not in any of his pleadings identified such a comparator. On the contrary, it was their position that the claimant had sought to rely on an entirely different set of comparators. The difficulty for the claimant was that the Tribunal had already ruled that he was not to be permitted to amend his claim so as to include a claim based on these new comparators. The sole claim which was before the Tribunal was in respect of the original comparators and the claimant was not offering in any way to prove that he was paid less than the individuals in those roles. In addition the claimant had not made any averments so as to indicate that the job evaluation scheme was unreliable or tainted by sex or indeed anything which would give rise to such a suspicion. The respondent's position was that on the basis of the current pleadings the claim had absolutely no hope of success. The claimant had implicitly recognised this by seeking to amend but his application to amend had

been refused for the reasons given therein. These reasons included the fact that, as identified in the judgement, such claims themselves were in many cases unstatable, time barred or had no prospect of success. There was no suggestion of any likely permissible amendment which had not already been adjudicated upon and would improve the claimant's prospects.

Claimant's submission

6. It was clear to me that the claimant did not entirely understand the arguments which were being made and indeed the claimant's submission tended to support the respondent's position. The claimant stated several times during his submission that the claimant's representative was simply wrong to say that he was making a claim based on the comparisons set out on page 20. On numerous occasions he repeated his claim that the basis of his grievance over equal pay was that Mrs Paterson who, on his evidence, had left the respondent's employment in 1989, was paid two grades ahead of him. The claimant offered to provide witness evidence that someone his wife had met at the supermarket had confirmed this to her. The claimant also referred to various other historic grievances about his job. He indicated that at one point he had been working 40 hours a week but had only been paid for 34½ hours. He indicated that when he was working there he required to remove graffiti himself using potentially dangerous chemicals whilst he was now aware that the council got a specialist firm in to do this. He also complained about not being provided with a trolley and having to do heavy lifting of chairs and tables when he had to move these for functions. He complained about having to go on the roof to clear it from time to time. He also referred to various male employees who he had worked with who he understood had been paid more than him.

7. During his submission the claimant was extremely critical of the respondent indicating that they had placed hurdles in front of him. He said he had spoken to ACAS who had given him what appeared to be generic advice about asking his employers for information. He also raised issues about losing unsocial hours' payments by having other employees being asked to work on Thursday and Friday nights. He complained of being

made to work weekends or forced to take an entire week's holiday if he wished to have a weekend off. He indicated that he only started being given Saturday overtime when a Mr Skelton became involved in managing the facility he worked at. He also indicated that he was currently suffering from a number of medical conditions and that his doctor had referred him to take specialist tests on the basis that he may be suffering from vibration white finger as a result of having to operate a floor polisher whilst in the employment of the respondent.

8. Very little of what the claimant said was relevant to his equal pay claim as it currently stands. The only points mentioned related to Mrs Paterson and it is clear that if there was ever an equal pay claim based on a comparison with her (and bearing in mind it was the respondent's position that she was employed to do a more managerial role than him) such claim had prescribed many many years before his claim was lodged in 2016. During the claimant's submission I listened assiduously for anything which might be relevant to the issue before me or any suggestion from the claimant that he may be in a position to pursue his claim as currently pled but there was nothing.

Respondent's further submissions

9. On being asked to comment Ms Macara indicated that the claimant's position was that he was quite clear that he was not intending to prove any of the claims which were currently before the Tribunal. Instead he wished to pursue other claims which the Tribunal had already decided he would not be permitted to do. Ms Macara refuted the allegations made against herself and the respondent. She indicated that the respondent had probably engaged with the claimant more than she would have advised them to do given there was ongoing litigation between them. The respondent had at all times tried to work out exactly what the claimant was claiming and deal with him appropriately.

Claimant's further submissions

10. The claimant repeated his position which was that he did not understand the respondent's submission. His claim was in relation to Mrs Paterson being paid two grades above him. Given that the respondent had an alternative conclusion for a deposit order I asked the claimant whether he wished to provide me with any financial information about his income and savings which I would take account in making a decision on this matter if I decided the claim should not be struck out. He indicated he was currently in receipt of universal credit. He stated he would not be able to afford to pay a deposit of £1000.

Discussion and decision

11. The respondent's representatives helpfully referred to a number of the leading cases on strike out in relation to discrimination claims in their submissions. I would agree with their summation of the law. The case of ***Glamorgan NHS Trust v Eyzsias*** [2007] IRLR 603 makes it clear that there is a high hurdle to be overcome before striking out a discrimination claim. I was also aware of the high burden placed on Judges who are dealing with applications for strike out where the case involves a litigant in person as discussed in the case of ***Cox v Adecco and others*** EAT/0339/19. I accepted that the onus was on me to consider the pleadings and other core documents that explained the case and take reasonable steps to identify the claims and issues. I took this task seriously. The claimant is not a lawyer but he has a clear perception that he has been treated unfairly. I believed it was my task to listen carefully to what he had to say to identify whether his claim had any reasonable prospect of success even if it meant that there was still further work to be done in refining and clarifying the pleadings.

12. In this case I felt that to some extent I was being asked by the claimant to revisit the issues which I had already decided upon in the judgment relating to the application to amend. In that judgment I had sought to analyse the claims now being made by the claimant and take them at their highest. At that stage I considered most of the new claims were essentially unstateable. I noted also that during that hearing the claimant confirmed that his previous representatives had withdrawn from acting after telling him that he did not have a case. I also note my finding that

when assessing prospects of the best case which the claimant wished to put forward at that time it was clear that he would have considerable difficulties. Even if the claimant overcame all of these difficulties there was also the issue that on the basis of the information to hand he would not receive any compensation because of the five year time limit.

13. My decision in respect of the amended claims which the claimant apparently wished to make has already been given. These claims are no longer before the Tribunal. I have rehearsed the reasons for that judgement above so that the claimant may be reminded that the tribunal has already listened to his arguments regarding the case he wished to make and rejected it.

14. What I have to decide today is to whether the claim which is currently before the Tribunal has any reasonable prospect of success. In order to succeed the claimant would have to show that he is doing like work, work rated as equivalent to or work of equal value with a woman holding one of the roles listed on page 20 of the bundle and that that woman is paid more than him. The claimant has made it clear that he is not seeking to argue this. Indeed, several times during the hearing he expressed annoyance that the respondent was misrepresenting him by suggesting he was. The claimant's own clear position was that he was not seeking to make an equal pay claim based on these comparisons. He wanted to raise the other matters which the Tribunal has already decided he is not to be permitted to do. It also appears that, in addition to this, the claimant also wishes to raise various historic grievances which have nothing to do with equal pay.

15. In carrying out the exercise suggested in the ***Cox v Adecco*** case I believe I am required to look at all the material before me and I have done this. I have listened carefully to all that the claimant has said to see if there is any chance that the claim has any prospect of success. My conclusion is that it does not.

16. The claimant can only succeed in his claim if he can show that his right to equal pay has been infringed in respect of those comparisons which are currently pled. The respondent's position is that based on their pay

information the claimant's right to equal pay was not infringed on the basis of any of these comparisons. The claimant no longer asserts this is not the case. The claimant's position is that he does not wish to insist on these pled comparisons. He does not have any information to suggest that matters are otherwise than as stated by the respondent in respect of these comparisons. It is clear to me that on that basis his claim has no reasonable prospect of success.

17. The initial pleadings also make a challenge to the job evaluation scheme. This is contained in paragraph 3 which states

> "To the extent that the claimants are comparing themselves of the comparators who have been rated as equivalent or higher than them under the Fife Council Job Evaluation Scheme the claimants submit there are reasonable grounds to believe the job evaluation scheme is unsuitable to be relied upon."

18. As noted above the Tribunal has already decided that the job evaluation scheme is valid. There is still an application made by other claimants which will be dealt with at a hearing in the New Year in order to determine whether the job evaluation scheme is tainted by sex discrimination or otherwise unreliable. It did occur to me that it may be appropriate to wait on the outcome of that hearing before making a final determination in respect of the claimant's case. The difficulty for the claimant however is that he has specifically stated that he is not in fact relying on any of the comparisons made in the original claim. He has also not indicated in his own pleadings why there is any suspicion that the job evaluation scheme was unreliable or tainted by discrimination in respect of himself. It appears to me that even if the Tribunal does make a finding that the job evaluation scheme was somehow unreliable in relation to those claimants who are making that claim before it, this would not assist the claimant in any material way. The claimant would still be faced with pursuing a claim which he has specifically said is not the claim which he believes he has.

19. For the above reasons I considered it established that the claim has no reasonable prospect of success. It may well of course be that this was also the conclusion reached by the claimant's previous solicitors when

they withdrew from acting. The decision to dismiss a claim which has no reasonable prospect of success is of course a discretionary one but in this case I consider that given the situation there is no question but that the appropriate course of action is to dismiss the claim. There is no point in allowing it to go further. The claimant has already had his application to amend refused. Any further application to amend would be certain to meet the same fate for much the same reasons as given in the original July judgment. The claim will therefore be dismissed.

Employment Judge: **I McFatridge**

Date of Judgment: **21st December 2022**

Date issued to parties: **22nd December 2022**