EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107591/2019 (A)

Hearing via Cloud Video Platform on 12 April 2023

Employment Judge R Gall
Tribunal Members P O'Hagan
J McCaig

Mr E Veizi	**Claimant** **Represented by:** **Mr A Elesinnla - Barrister** **[Instructed by Strand Solicitors]**
Glasgow City Council	**Respondent** **Represented by:** **Mr S Miller - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the respondent is permitted to amend its answers to the Order of the Tribunal of 16 January 2020 so that the answers to questions 13 (a) (ii), 13 (a) (iv) and 13 (a) (vii) now read as follows:

> "*13 (a) (ii) Ms Paterson carried out a supervision meeting with the Claimant on 10 April 2018 where all of his voids were discussed. Some of his allocated flats were nearing the end of the void process and should shortly have been made available for let. The following week, Ms Paterson noticed during her regular check of all potential flats to be made available for let that these flats were still void. On checking further, she noticed that duplicate furnishings had been ordered. She discussed this with Gary Quinn, who requested that Ms Paterson and Ms Miller check other flat files for similar anomalies. This was carried out over the next few weeks and copies of all of the flat files where anomalies were picked up were printed off and passed to Gary Quinn. Thereafter Ms Paterson met with Gary Quinn and Willie Kelly to discuss the files in detail. The review carried out by Ms Paterson and Ms Miller covered approximately 200 tenement*

flats in the South area, which was more or less every flat in that region. They used the Respondent's repairs system to check whether items were double-ordered for any of the flats. From the flats reviewed, issues were identified in relation to 8 flats. These were all flats for which the Claimant was responsible. No issues of double-ordering were identified in relation to the other flats.

13 (a) (iv) No, in that Ms Paterson and Ms Miller were not reviewing any particular TAD Officer but rather simply reviewing the flats in the South area. The flats reviewed included the flats for which two other TAD Officers (who were allocated to the South area along with the Claimant) were responsible.

13 (a) (vii) As noted at 13aiv above, the review which was carried out involved checking the Respondent's repairs system in relation to approximately 200 flats in the South area for instances where items had been double-ordered. This therefore encompassed reviewing orders placed with RSBI for white goods by the three TAD Officers allocated to the South area, which included the Claimant.

REASONS

1. This was a Preliminary Hearing ("PH") set down for case management purposes. It was conducted by video conference, CVP. Mr Elesinnla appeared for the claimant. His instructing solicitor, Ms Sheikh, was present on the video call, as was the claimant himself, Mr Veizi. Mr Miller appeared for the respondent. Ms McFarlane, instructing solicitor within the respondent, was also present on the video call.

2. The PH was held following the decision of the Employment Appeal Tribunal ("EAT") to remit to the Tribunal one matter following an appeal hearing. The respondent had, immediately prior to commencement of the hearing before the Tribunal in October 2021, applied to add information to its answer to elements of questions set out in an Order from the Tribunal of 16 January 2020. The Tribunal refused that application. It had ruled that questions could be asked of witnesses about the investigation. There was an appeal and cross appeal taken.

3. The EAT upheld the appeal and cross appeal on this particular aspect of the ruling of the Tribunal, refusing other points of appeal taken. Its decision was to

remit a question back to the Tribunal which had made the initial decision. The disposal, in paragraph 63 of the Judgment of the EAT read:-

"The question of whether the respondent should be permitted to amend its answers to the order to provide further information should be considered afresh by an employment tribunal, taking account of all the relevant factors including the relative hardship to each party of allowing or refusing the change and whether practical steps can be taken to reduce or eliminate it."

Conversion to Open PH

4. At the outset of this PH, Mr Miller said that in his view this PH should be an "open" PH rather than a "closed one" for case management purposes. The Tribunal was being asked to rule on the rights of parties. A further date should be set for such an open PH. Mr Elesinnla was keen that the Tribunal proceed with determination of the matter in order to make progress in the case.

5. After brief discussion, the respondent confirmed that it was prepared to consent to redesignation of the PH and was content that the matter remitted be dealt with by the Tribunal at this PH.

Submissions of parties

6. The Tribunal confirmed that it had its notes of the matters canvassed at the time it made its initial decision on the application. It encouraged representatives not to repeat at length points previously made, whilst also wishing to ensure that opportunity was given to make relevant points in relation to the matter to be determined.

7. The Tribunal heard submissions and adjourned to discuss those and to reach a decision. Prior to announcing its decision to parties, it confirmed with them that the application extended to the proposed additions to paragraphs 13 (a) (ii), 13 (a) (iv) and 13 (a) (vii) of the answer to the Order of 16 January 2020. That was the understanding of the Tribunal and of Mr Elesinnla. Mr Miller was unable to assist on that point. The Tribunal proceeded on the basis that the matter for determination by it was the proposed additions to the three paragraphs just mentioned.

8. For the respondent, Mr Miller said that the answer remained that no other TAD officer had been investigated. The respondent had considered the handling of various properties. That brought to them knowledge of what other TAD officers had done. The proposed additions were not therefore a contradiction of their position as detailed in the initial answers. The proposed additions drew the claimant's attention to what had happened and would aid preparation for the hearing. The Tribunal should permit the addition weighing the respective prejudice to parties.

9. For the claimant, Mr Elesinnla highlighted that the proposed additions sought to supplement answers to an Order issued over a year prior to their intimation. There was prejudice to the claimant if the application was granted. The respondent was looking to take a calculated step to improve their position. There had been nothing in the pleadings or during the internal disciplinary procedure to suggest that the respondent had looked at the flats or work of anyone other than the claimant. This was a cynical, calculated attempt by the respondent to improve its case on the eve of the hearing. There was inevitably prejudice to the claimant.

10. It was important that the Tribunal did not simply allow these matters to be advanced on the basis that it would then determine the facts at a later stage, Mr Elesinnla said. The Tribunal could only decide on matters "in play". This proposed development of the respondent's case should not be in play.

11. If it was said that significant prejudice would be caused to the respondent if the application was refused, Mr Elesinnla noted. That raised the question as to why these matters had not been advanced prior to the time when they were intimated.

12. The claimant would be prejudiced if the answers were added to in the fashion proposed. The case would be extended. It had already been substantially delayed. The claimant was funding his case privately.

13. Witness statements being prepared would, Mr Elesinnla said, have avoided such evidence being introduced "on the hoof". The respondent was trying to

meet a case of discrimination by introduction of this reference to investigation of 200 flats.

14. Mr Miller was invited to reply to points which had been raised by Mr Elesinnla and which he had not covered in his initial submission. He said that those investigating had not investigated other TADs. They had confirmed that in the initial response to the Order. What was now sought to be added was information as to what they had actually done in the investigation. If that was not permitted to be added, then they could not give evidence as to what they did in the investigation. That was clearly prejudicial to the respondent.

Decision

15. After adjournment and having clarified that the proposed addition related to the three subparagraphs in question/answer 13, the Tribunal made its decision known to the parties.

16. The unanimous decision of the Tribunal was that the additions to the answers as proposed would be allowed.

17. In reaching its view the Tribunal kept in mind the lateness of the proposed additions. It remained concerned as to that. It troubled the Tribunal that this fuller response now proposed had not been provided when the Order was initially responded to. The additions did not however contradict the answers previously given.

18. There was prejudice to the claimant if the additions were permitted. The claimant would face a position from the respondent which had not been anticipated. It was likely that the case would be lengthier and might take longer to come to a hearing. Cost to the claimant in preparation might therefore increase.

19. There was prejudice to the respondent if the additions were not permitted. The investigation was criticised in the case of unfair dismissal brought by the claimant. It was said by him that the investigation was unreasonable. The claimant also maintained that the disciplinary investigation was an act of discrimination. If the additions were not permitted then the respondent would be

unable to give evidence in relation to potentially important areas for assessment by the Tribunal. In particular, the respondent would be unable to place before the Tribunal for its assessment information as to the conduct of the investigation and as to the methodology used by it. In circumstance of the allegation of an unreasonable investigation, one which constituted an act of discrimination, the degree of prejudice to the respondent was viewed by the Tribunal as significant.

20. The Tribunal kept in mind that there would remain the ability to challenge the respondent's witnesses by way of cross examination. The Tribunal would also be sympathetic to any application made in relation to obtaining any relevant surrounding documentation.

21. Looking to the relevant matters of the timing and reason for the application, the prejudice/hardship caused if on the one hand the application was refused and if on the other it was granted, the interests of justice and the overriding objective, the unanimous decision of the Tribunal was that the application would be permitted, with the answers to the three subparagraphs within paragraph 13 being permitted, as confirmed above.

Case Management Matters

22. Mr Elesinnla highlighted that the EAT had referred to the Tribunal taking account of whether practical steps could be taken to reduce or eliminate hardship caused by the decision it reached. The Tribunal confirmed that it would be sympathetic to any potential application. It also was aware that it might well be appropriate to release the claimant to an extent from the obligations to which he was subject given that was in the midst of giving his evidence.

23. Mr Elesinnla said that he might have to address the Tribunal on the claimant's behalf in days to come as to steps which the Tribunal should take to mitigate the prejudice to the claimant. He then referred to one matter he wished to raise at the moment. That was the obtaining of documents relative to the investigation of the 200 flats which the respondents said had been carried out. He sought documents relating to the investigation in whatever form they existed, the time limit for those being disclosed to the claimant being 21 days. He also asked that

the claimant be released so that he could give instructions in relation to the documents so disclosed.

24. Mr Miller confirmed that the documents would be made available. After discussion as to the time permitted for that, 28 days were agreed as being the time within which any relevant documents would be made available to the claimant. Mr Elesinnla confirmed he would agree to that timeframe. That therefore means that those documents would be made available by close of business on 10 May 2023.

25. The Tribunal confirmed that the claimant was released from his obligations as a witness currently giving evidence to the extent necessary to provide instructions upon the additions to the answers as permitted and upon any documents now produced by the respondent relating to the investigation.

26. Discussion then took place as to the resumption of the hearing. Various elements make it difficult for there to be an early date for that resumption.

27. Ms Ross is currently on maternity leave and is scheduled to return to work on 1 September. Given her conduct of the earlier days of hearing it is appropriate that she continue representing the respondent if at all possible. Mr Elesinnla has a fairly significant medical procedure pending. The precise date has yet to be confirmed, however it is likely to be over the next 2 or 3 months. A recovery period will be involved. There are also likely to be 19 witnesses for the respondent. The respondent anticipates that, in addition to conclusion to the claimant's evidence, some 13 days will be required for its witnesses. Mr Miller did not have information before him as to availability of those witnesses.

28. It was agreed that date listing letters would be sent out by the Clerk to the Tribunals. It appears likely that the dates will be late 2023. In fact, looking to travel commitments on the part of one of the Tribunal, it may well be that the remaining days of hearing cannot happen before later February or March of 2024. It was noted that it was possible that Ms Ross would return to work on the basis of her working days being Monday to Thursday. Tribunal hearing dates would therefore require to reflect any such working pattern. When submitting date listing letter replies parties are asked to indicate in relation to each witness

an anticipated time requirement for examination in chief and for cross examination, as best they can estimate that.

29. Both Mr Elesinnla and Mr Miller made further applications in relation to conduct of the remainder of the hearing.

30. Mr Elesinnla sought the ordering of witness statements for the respondents witnesses. This would streamline and limit hearing time, he said. Mr Miller opposed this. The Tribunal refused the application. The Presential Direction in relation to witness statements was a relevant factor. Importantly, having heard Mr Veizi's evidence thus far orally, the Tribunal was of the view that other witnesses should similarly be heard orally.

31. Mr Miller sought that the remaining days of evidence were heard in person rather than by video hearing. Covid had receded and if conducted in person the respondent's witnesses would find giving of evidence easier given that not all had 2 screens. Preparation of 19 copies of the documents would also be avoided. Mr Elesinnla opposed this application. He pointed out that witnesses were scheduled to appear at the first hearing and so documents should be ready for them. His health was such that travelling and being in Glasgow for 3 or 4 weeks might be problematic.

32. The Tribunal refused the application. It had seen Mr Veizi on video and would require to assess credibility of Mr Veizi and other witnesses. It was regarded by the Tribunal as of importance that witnesses were seen via the same medium. There was also force, in the view of the Tribunal, in the submission that documents for witnesses would have, or should have, been in place for the hearing in October 2021.

33. There were no other relevant matters and the hearing came to an end.

Employment Judge: **R Gall**
Date of Judgment: **20 April 2023**
Entered in register: **21 April 2023**
and copied to parties