EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4102333/2022 & 4100441/2024

Held at Aberdeen on 24 June 2024

Employment Judge J M Hendry

Miss Kathryn Hilton	**Claimant** **Represented by,** **Ms R Cox** **Grampian Community Law Centre**
Highland Council	**Respondent** **Represented by,** **Ms I Hamilton,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal holds as follows:

(One) The claim for direct sex discrimination under Section 13 of the Equality Act having no reasonable prospects of success is struck out.

(Two) The application for strike out in relation to the claim for indirect discrimination not being well founded is refused.

(Three) The three ciaims for detriment under Section 27 EA namely:

(a) That she was not supported from (by her managers Phillip Barron and Shane Manning in October 2021 following an incident she had with a member of the public ("lack of support allegation")).

(b) in December 2021 Phillip Barron told colleagues that the claimant had lied in her interview for the role ("the interview allegation'[5]).

(c) That her manager Phillip Barron and other colleagues had ignored her in January 2022 ("the ignoring allegation") having no reasonable prospects of success are struck out.

REASONS

1. A Preliminary Hearing took place by CVP Digital Platform on 24 June 2024. The date had originally been assigned as a hearing on disability status but shortly before it took piace the claimant withdrew her disability discrimination claims. The respondent's agents had lodged a strike-out application on 19 June 2024. That application dealt with not just the disability discrimination claims but also the other claims being made for direct or indirect sex discrimination, victimisation and detriment.

2. At the outset, it was agreed that I would hear the strike-out application first and then we would discuss case management issues.

History

3. The claimant worked for the respondent as a Parking Enforcement Officer. She lodged a grievance about her working conditions in March 2022. She

then raised Employment Tribunal proceedings on 28 April 2022 and did so without legal assistance. The claims in the ET1 are not particularly clear. They make reference to "Breach of Health and Safety and operational protocol and endangering life and bullying". There is a narrative of various difficulties the claimant encountered at work as a Parking Enforcement Officer in Inverness.

4. The claim was sisted pending determination of the claimant's internal grievance. This was determined in her favour in September 2023. The claimant resigned in November 2023 and a second claim for unfair dismissal was lodged on 22 January 2024. That claim also included claims for disability discrimination, sex discrimination and public interest disclosure-detriment.

5. A Case Management hearing took place on 19 March 2024 before Judge Campbell who issued a detailed and comprehensive Note. He set out the claimant's complaint at paragraph 7 (JBp.67-70). Paragraphs F to J set out what the Judge said about the claims being made.

6. I asked Ms Hamilton to indicate where I could find the pleadings that she intended referring to. She indicated that the pleadings were not in one comprehensive document but were contained in the two ET1 documents, in Further and Better Particulars lodged in May 2024 (JB90-97) and also in a letter dated 20 June 2024 from the claimant's representatives. Ms Cox confirmed that this was the case. In that letter the claimant's representative tried to distil the claimant's claims while responding to the strike-out application.

7. I asked the respondent's agent to take me through the strike-out application submissions she had lodged claim by claim and after she had addressed each one then Ms Cox was invited to respond. We accordingly worked our way through the various claims that had been made.

Direct disability discrimination - Section 13 Equality Act (EA)

8. The respondent's solicitor made reference to the strike-out application and adopted the reasons given there. Her position was relatively straightforward. The claimant had not attempted to show any causal link between the conduct she complained of and her sex. Her pleadings were confused. It might very well be that she experienced various unpleasant incidents at work. Why this amounted to direct sexual discrimination was not clear from the pleadings.

9. Ms Cox took me to her client's understanding of the facts of the case. She explained the background one of which was the problems the claimant had working in hours of darkness on her own contrasted with the way her male counterparts were allowed to work. I asked if her male counterparts were required to work on their own. She responded that they did less of this work and were allowed to go in pairs or to drive. In response to Ms Hamilton's comment that the claimant had been unable to identify a real comparator Ms Cox explained the difficulties in using various male workers as comparators given that differences between those officers and the claimant. She explained that one officer had a "bad back" and was allowed to do patrols in his car. Another was the husband of a female officer who behaved badly towards the claimant. I detected a reluctance to use this person as a comparator and observed that a comparator didn't need to be a friend of the party but simply had to be "in the same boat" in relation to their required duties. I indicated that I was struggling to understand a claim based on direct discrimination unless it was being said that because she was a woman she was being asked to work in this way.

10. The claimant's position was set out in the representative's letter of 20 June:

> *"Our client was treated less favourably than her male counterparts in that she was frequently required to work alone and during hours of darkness. Miss Hilton was also required to patrol the streets with significantly greater frequency and for significantly extended periods in time than her male counterparts. She was not afforded the same type of opportunities to complete work within the office as her male counterparts"*

Indirect discrimination Section 13 EA

11. The respondent's solicitor indicated that in her view there was insufficient in the pleadings to shift the burden of proof in other words the claimant had not made a *prima facia* case of discrimination. There was confusion over the PCP that was being relied on. The PCP seemed to be a requirement to work alone and/or in the hours of darkness, however, in the Better and Further Particulars (JBp.94) it was stated that male officers required to work the same PCP. The same PCP had been used in relation to disability claims which had now been abandoned. She submitted that the claimant seemed to be taking issue with certain aspects of her role arguing that these aspects were less favourable treatment linked to a protected characteristic where in reality the respondent was merely requiring the claimant to fulfil duties connected with her role.

12. The respondent argued that the PCP that the claimant was required to work alone in the hours of darkness was insufficient.

13. In response Ms Cox indicated the claimant was treated differently from male officers. The words in Paragraph 6(a) (JBp.94) were wrongly quoted. The claimant hadn't said that the officers were required to carry out the same duties. The phrase used was "and were not required to work in the street for prolonged periods". In other words, they were treated more advantageously. She indicated that there might be some internal protocols or policies but that bore on these matters but they had not yet identified these yet and she was not able to point to them today. In her submission the issue of lone working was clearly a health and safety risk for female officers and as such a disadvantage.

Victimisation Section 27 EA

14. Ms Hamilton indicated it was not clear as to what the protected act was that the claimant relied on. She indicated that if the protected act was said to be

the original Employment Tribunal application made in April 2022 then that contained no claims under the Equality Act. She also claimed that the complaint made was to her manager Shane Manning in October 2021 was a "health and safety complaint". The making of a health and safety complaint cannot be said to be a protected act for the purposes of section 27(2) of the Equality Act. The four detriments that she said occurred were:

(a) That she was not supported from (by her managers Phillip Barron and Shane Manning in October 2021 following an incident she had with a member of the public ("lack of support allegation")).

(b) In December 2021 Phillip Barron told colleagues that the claimant had lied in her interview for the role ("the interview allegation").

(c) That her manager Phillip Barron and other colleagues had ignored her in January 2022 ("the ignoring allegation") and

(d) That the grievance procedure which concluded on 1 September 2023 was flawed because it was delayed, biased and the grievance outcomes were not implemented ("the grievance allegations"). It was noteworthy, she submitted, that all but the grievance allegation predate the first Employment Tribunal claim in April 2022. It is not said that the allegations are said to have occurred ("because of a protected act"). This is supported by the fact that the claimant's case is that the respondents continued to bully the claimant "following the protected act" (JB95, paragraph 15) suggesting that the bullying started before the protected act and continued thereafter. There is no identified causal link.

15. The claimant's representative's position was that although not couched in as clear terms as it could be the original ET1 in April 2022 did raise Equality Act matters. The incidents that were quite clearly matters which the claimant felt were unsafe such as the incident she narrates in which the Police apparently

reported the respondent to the Health and Safety Executive for having the claimant work on her own.

Disclosures

16. Ms Hamilton turned to the possible PIDs. In order for the claimant for whistleblowing detriments to be perceived the claimant must have been subject to a detriment on the grounds she made protected disclosures. The claimant seems to be relying on the health and safety complaint she made to Shane Manning. The claimant alleged she told Mr Manning she felt unsafe working alone. This was not sufficient in her submission to be a qualifying disclosure. This is simply an assertion.

17. There must first be a "qualifying disclosure" which requires information to be disclosed which, in the reasonable belief of the employee, is made in the public interest and tends to show that one or more of a list of wrongs is occurring (sections 43A and 43B ERA). Accordingly, there must be a disclosure of information, simply voicing a concern is not enough. This point was explored in *Cavendish Munro Professional Risks Management Ltd v Geduld* UKEAT/0195/09.

18. Ms Cox's position was that the claimant did feel unsafe and the situation was that the respondents must have been aware of this. She indicated that the claimant could lodge Better and Further Particulars to clarify these matters. Ms Hamilton advised that any such application would be opposed given the length of time it had taken to clarify this matter.

Case management issues

19. It was agreed that Date Listing Letters would be sent to identify a Final Hearing possibly between four and five days in September, October or November of this year. Secondly, the respondent's representatives are to take up-to-date instructions in relation to Mediation. If they are

prepared to agree to Mediation depending on what claims are left following **the termination of the strike-out application.**

Discussion and Decision

Strike Out The Legal Principles

20. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that:

"37. *Striking out*

(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;.....

(c) for non-compliance with any of these Rules or with an order of the Tribunal..."

21. In applying the Rules the Tribunal must have regard to the overriding objective in Rule 2:

"Overriding objective

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 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."

22. It has been recognised that striking out is a draconian power that must be exercised carefully. If exercised it would prevent a party from having their claim determined by a Tribunal. The legal principles applicable in relation to the striking out of discrimination complaints pursuant to this Rule are well-established. In the House of Lords case of ***Anyanwu & Ano v South Bank Student's Union and Ano*** 2001 ICR 391, Lord Steyn said as follows:

"24. … *Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university"*

At paragraph 39 in the judgment of Lord Hope of Craighead, he said as follows:

"Nevertheless, I would have held that the claim should be struck out if / had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail."

23. In ***Ezsias v North Glamorgan NHS Trust*** 2017 ICR 1126,CA, a case referred to by both sides, the Court of Appeal was considering a case involving public interest disclosure and held that a claim should not ordinarily be struck out where there was a:

"29. … crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. …It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. …"

24. In the more recent case of ***Ahir*** v ***British Airways pic*** [2017] EWCA Civ 1392, Underhill LJ said as follows:

"16. … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and ! am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."

Direct Discrimination

25. The definition of direct discrimination is contained in the Equality Act 2010 (EA):

"73 *Direct discrimination*

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

26. A claimant must attempt to demonstrate that the behaviour complained about was because of her sex. Unreasonable behaviour in itself is insufficient. It is common for a claimant to point to differences in treatment. However, it is well established that conduct which is unreasonable or unfair is insufficient without something more. This was the conclusion of the Employment Appeal Tribunal in ***Bahl v Law Society*** (2003) IRLR 640. It was held in ***Anya v University of Oxford*** (2001) IRLR 377,CA that whilst unreasonable behaviour was insufficient to found discrimination, if the respondent contended it treated (or presumably would treat) others badly, it was for them to prove this.

27. The respondent's position was that this was a case where the claimant had not sought to show that the conduct was on the grounds of her sex. In the case of ***Madarassy v Nomura International pic*** [2007] ICR 867, CA, Mummery LJ stated that: *"The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude*[1] *that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination".*

28. In the present case the claimant does not say that the behaviour complained of was because of her sex. She does not aver "something more" that would allow a Tribunal to find or infer a particular form of discrimination. She seems to look at being asked to do lone patrols on the basis that she was concerned that this was a risk to her as a woman. There may be some basis for this

belief but that is not the point. It is looking at matters solely from her perspective and not saying what the cause of the treatment is.

29. It seems that any claim based on direct sex discrimination is bound to fail. There is no bar to striking out cases, even discrimination claims in the appropriate circumstances ***(Ahir).*** I am conscious of the fact that the claimant has a stateable claim for unfair dismissal which will proceed irrespective of the strike out application. She can explore the issues involved in lone patrols in that arena. The claim for direct sex discrimination is struck out.

Indirect Discrimination

30. Section 19 of the EA is in these terms:

"Section 19 Indirect discrimination
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

31. There was a discussion as to what the PCP properly could be in the sort of situation the claimant found herself in. It seemed common ground that the practice was to have lone patrols where there was no colleague to accompany the Officer. To say that male officers work the same PCP is not necessarily fata! to the claimant as the starting point is surely the common duties although I accept that the pleadings could be clearer. The claimant argues that she suffers particular disadvantage doing solo patrols as a woman and secondly in practice she does more of such patrols than male officers.

32. I was not referred by parties to the recent Court of Appeal case of *Ishola* v *Transport for London* which I think contains important guidance. At paragraph Lady Justice Simler said this:

"In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one".

33. As noted earlier the claimant alleges two things. The first is that she had to do more solo patrols in the dark than her male counterparts were asked to do (no actual statistics are produced or any list of dates on which this occurred or reference to times of the year) and secondly that she was more at risk of assault than her male colleagues if on her own. These are the two states of affairs that she says she can prove. This is sufficient for the Tribunal, if it is so minded, to hold that this was a PCP. The respondent's position is that this is part of any Officers duties and required to fulfil their function but they take the issue of possible justification no further.

34, I can see no reason the claimant cannot rely on a real comparator namely the male officer who does not get to patrol in a vehicle like his male colleague who has a 'bad back'. I do not accept that the claimant's position can be said to have no reasonable prospects of success or the lower standards of having little prospects of success. The strike out application must be refused.

Victimisation Section 27 EA

35. Section 27 is in these terms:

"27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."

36. The ET1 raised in April 2022 (case 4102333/2022) does not have any box 'ticked' in relation to discrimination. However, the narrative starts with *"Since June 2021 I have been working alone on the streets of Inverness, while the male officers always find or are issued with other duties".* The last part of the form under remedy (Box 9.2) states: "*I wish to be treated equally."*

37. There is to an extent an overlap with the Health and Safety allegation. It is however clear that there has perhaps been insufficient focus on the terms of the section. A complaint in relation to a health and safety matter is not a claim under the Equality Act. In my view there is just enough for the Tribunal considering the case to possibly conclude that the raising of the proceedings was a protected act and to determine if the allegations are true whether they were caused by the protected act. Crucially however the first three allegations all occurred before the ET1 was raised. In these circumstances they have no prospects of success and must be struck out.

38. This leaves the final allegation which is not particularly dear. There is no stated causal link between later events complained of and submission of the ET1 in April 2022. Ms Hamilton makes a strong point when she highlighted the issue of bullying apparently from the pleadings being longstanding and there being no averments that it got worse or changed in some way and that this was attributable to the raising of proceedings. I am not minded to strike out this allegation but as it stands there are problems with the pleadings. I conclude that is has little prospects of success.

PIDS

39. A disclosure to an employer must have certain elements to become a qualifying disclosure. Such cases are fact sensitive and much depends on the context.

40. The definition of Protected Disclosure is contained in Section 43B of the Employment Rights Act 1996:

"43B Disclosures qualifying for protection.
(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 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"

41. The issue taken by the respondent was that the disclosure here was an allegation and not information. The Tribunal was referred to the well known case of *Cavendish* and the distinction drawn there between information and allegation.

42. The leading guidance for a statement to be "a disclosure of information" is the Court of Appeal's decision in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436, [2018] I.C.R. 1850. The Court of Appeal emphasised that there is no rigid dichotomy between information and an allegation or opinion, but nor is it the case that every allegation or statement of belief conveys information. What is disclosed must have sufficient factual content and specificity, viewed in context, for it to sustain a reasonable belief that the information tends to show a relevant failure. In less clear cases, this requires an evaluation by the Tribunal taking into account all the circumstances.

43. In *Kiiraine,* Sales LJ accepted that, with the benefit of hindsight, para [24] in *Cavendish Munro* was expressed in a way which had given rise to confusion. He suggested that the ET seemed to have thought that *Cavendish Munro* supported the proposition that a statement was either 'information' (and hence within s43B(1)) or 'an allegation' (and hence outside that provision). The ET had accordingly erred in law, and Langstaff J in his judgment in the EAT had to correct this error.

44. Indicating to someone that it was unsafe for them to patrol alone on the streets particularly in hours of darkness is in my view potentially capable of amounting to a Protected Disclosure. The matter must be taken in context and there are facts contained in the statement namely that the person is being asked to patrol alone and in hours of darkness. This matter is fact sensitive and I am not prepared to say that the claim has no reasonable chances of success. Neither party seems to have addressed another crucial element which is the public interest test and no submissions were made on this point but I point it out as it is something that will need to be addressed.

45. The respondent did not seek deposit orders as an alternative and accordingly I have not applied the lower standard of little reasonable prospects to the various claims being made.

Employment Judge: J M Hendry
Date of Judgment: 3 July 2024
Entered in register: 3 July 2024
and copied to parties