EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104095/2020, 4104097/2020, 4107500/2020 and 4107501/2020 (V)

Preliminary Hearing held remotely on 7 May 2021

Employment Judge A Kemp

Mrs Aileen Harrower	**First claimant** **Represented by:** **Ms R Jiggens** **Paralegal**
Mrs Lorraine McVicars	**Second claimant** **Represented by:** **Ms R Jiggens** **Paralegal**
Saturn (Scotland) LLP	**First respondent** **Represented by:** **Mr A Bourke** **HR Consultant**
Andrew Bourke	**Second respondent** **In person**

JUDGMENT

1. **The Tribunal refuses the claimants' application under Rule 39 for a deposit order in relation to the respondents' application for strike out.**

2. **The Tribunal grants the claimants' application for reconsideration of the decision on 8 December 2020 to reject the claims made in the applications numbers 4107500/2020 and 4107501/2020 against the third and fourth respondents named on the Claim Forms, and directs that the Claim Forms for said claims be served on the third and fourth respondents in accordance with Rule 15.**

3. **The Tribunal refuses the claimants' application that the first and second respondents be "barred" from taking any further part in claims 4107500/2020 and 4107501/2020.**

REASONS

Introduction

1. This was a Preliminary Hearing held to consider applications made by both parties, and for certain case management issues which are addressed by separate Note. The hearing was held remotely.

2. These cases have had a long and not happy history. They have experienced a number of delays for a variety of reasons. A large number of applications have been made by both parties. The correspondence in the cases has been very lengthy. There are two separate claims for each of two claimants, with the second claims in each case repeating much of the averment of fact in the first.

3. The original intention for this hearing, that had been conveyed to parties by email from the Tribunal, had been to commence to hear the applications made by the respondents, a reply from the claimant, the claimants' applications, a reply from the respondent and then a discussion on case management, with 18 May 2021 available as a second day for the hearing if that was required.

4. On 4 May 2021 the respondents intimated a new application for a strike out under Rule 37 on the grounds of the alleged behaviour of the claimants' representative. The claimants' representative the following day intimated an application for a deposit order under Rule 39 in relation to

that application on the ground that it had little reasonable prospect of success.

5. I sought initially to hear argument on that application for deposit on the basis that the application for strike out would not be heard until the Preliminary Hearing that had been fixed for 18 May 2021, in light of the limited period of notice given by the respondents. The second respondent, who appears for himself and also as representative of the first respondent, sought a break initially, then a second time. He then explained that he had been violently sick, and that he found the proceedings very stressful. I indicated that I intended to continue with the hearing. He left the hearing again, and after a period of waiting I considered it appropriate to proceed to hear from the claimants. Relatively shortly thereafter he returned to the hearing and participated, although he chose to turn off the camera. I intimated the points addressed to me by Ms Jiggens when he had not been present, and gave him an opportunity for submission about them, and then continued with the hearing. He then continued to participate for the remainder of it.

6. I was satisfied that it was in accordance with the overriding objective to proceed in that manner given the history of the cases to date, the assertion by the claimants' representative that the two claimants each suffered from severe mental health difficulties including suicidal ideation and that they had been caused material stress by the delays experienced thus far.

Deposit order

(i) Submissions

7. In brief summary Ms Jiggens argued that there was little reasonable prospect of success in the claimants' argument for a strike out on the basis of her conduct. She had been robust in acting for her clients, but not approaching anything that could properly be regarded as inappropriate. I directed her to the terms of Rule 39, quoted below. I was concerned that the wording of that Rule indicated that the argument referred to required to be in the claim or response, in this case the response which may be defined by reference to Rule 16, therefore relating to what was the response to the claims made, and not to a strike out application on the

basis of alleged conduct falling within Rule 37. She was given time to find authority on the matter, and on resuming had not been able to find the same. She argued that the Rules permitted the order to be made, and why that was appropriate in the circumstances. She referred to the terms of Rule 29, and to the overriding objective particularly the interests of justice.

8. Mr Bourke referred to the comment I had made as to the matter of authority, and argued that he had evidence he would produce. He did not accept that there were little prospects of success. I gave him the opportunity to make submissions as to financial matters of both respondents, but he did not do so, stating that he had not asked the first respondent.

(ii) The law

9. Rule 39 provides as follows:

> "39 **Deposit orders**
> Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospects of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument….."

10. The EAT has considered the issue of deposit orders in ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14,*** and ***Tree v South East Coastal Services Ambulance NHS Trust UKEAT/0043/17***. In the latter case the EAT summarised the law as follows:

> "[19] This potential outcome led Simler J, in ***Hemdan v Ishmail [2017] ICR 486 EAT***, to characterise a Deposit Order as being "rather like a sword of Damocles hanging over the paying party" (para 10). She then went on to observe that "Such orders have the potential to restrict rights of access to a fair trial" (para 16). See, to similar effect, ***Sharma v New College Nottingham UKEAT/0287/11*** para 21, where The Honourable Mr Justice Wilkie

referred to a Deposit Order being “potentially fatal” and thus comparable to a Strike-out Order.

[20] Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under r 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in ***Anyanwu v South Bank Students' Union [2001] IRLR 305 HL*** per Lord Steyn at para 24 and per Lord Hope at para 37.

[21] In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the express requirement - see r 39(2) - that the ET shall “make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit”. An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see ***Hemdan*** at para 11.

[22] Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.

[23] Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is

entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see ***Wright*** at para 34."

11. Rule 29 empowers the Tribunal to make general case management orders, and the particular powers set out thereafter do not restrict that general power.

12. Rules are subject to the overriding objective in Rule 2.

13. There is little authority on the matter of a deposit order. I have not found any authority to indicate that such an application may competently be made where the argument is over conduct of a representative entitling a strike out under Rule 37, rather than the merits of the claim or response to that claim itself. Ms Jiggens was given time to find authority as she requested, but had not found that by the time the hearing reconvened. The lack of authority does not prevent the order being made, but if the application is competent in circumstances such as the present that would be surprising

14. I have concluded that it is not competent to make the order sought. The term response is referred to in Rule 16, and it appears to me that the terms of Rule 39 are directed to the pleadings as to the claims made, or responses in the sense of defences to those claims. It is the prospects of success of those claims or defences that allows a deposit order to be made, in my judgment. That appears to me also to be more consistent with the quotation set out above, albeit that it does not directly address the present point.

15. In any event, whether or not to make a deposit order is a matter of discretion, and I do not consider it appropriate to do so in relation to a claim for strike out on grounds said to relate to alleged behaviour of a representative where the second respondent states that he has evidence and will tender that by 11 May 2021, being the subject of an order in a Note and Orders issued of even date.

16. That is not to say, for the avoidance of doubt, that the application has reasonable prospects of success. There is a two-stage test as explained

in ***HM Prison Service v Dolby [2003] IRLR 694***, and ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit'. The test for strike out is accordingly a high one, and where the issue at the first stage is the alleged behaviour of a representative rather than a party more detailed considerations arise, as explored in ***Bennett v London Borough of Southwark 2002 IRLR 407.***

17. The claimants invited the respondents to withdraw both this application and a separate argument in relation to the second respondent not being an agent for the purposes of section 110 of the Equality Act 2010. Mr Bourke did not wish to do so.

18. It has been arranged that the application be considered at a further remote Preliminary Hearing on 18 May 2021.

19. In the circumstances set out above however I have refused the application for a deposit order.

Reconsideration

20. The application for reconsideration was made on the basis of the letter intimating the rejection of the claim as directed to the third and fourth respondents dated 8 December 2020. As a result the Claim Form had not been served on them. They are not at present therefore a party to the claims. It was only the latter two claims in which this issue arises directly, although there is an issue as to combining the claims addressed in the Note issued separately.

(i) Submissions

21. The claimants argued that the decision to reject the claims had been wrong. The reason given for rejection was the lack of Early Conciliation Certificates for those respondents. The claimants sought reconsideration and the application has only been addressed now in light of the

adjournment of earlier hearings seeking to do so. They argued that such certificates were not required for additional respondents under Regulation 3(1)(a) of the Employment Tribunal (Early Conciliation Exemption and Rules of Procedure) Regulations 2014. There were Certificates for the first and second respondents and that sufficed. Reference was made to Regulation 3(1)(b), and to Regulation 5(4). Separately they argued that EC Certificates had been obtained on 8 December 2020. No particular submission was made by the second respondent.

The law

22. Reconsideration of rejection of a claim is provided for in Rule 13.

23. Provisions for early conciliation were made under section 18A of the Employment Tribunals Act 1996.

24. Regulation 3 to the 2014 Regulations referred to, made under that statutory provision, is in the following terms:

> **“Exemptions from early conciliation**
>
> (1) A person ('A') may institute relevant proceedings without complying with the requirement for early conciliation where—
>
> (a) another person ('B') has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B;
>
> (b) A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings;
>
> (c) A is able to show that the respondent has contacted ACAS in relation to a dispute, ACAS has not received information from A under section 18A(1) of the Employment Tribunals Act in relation to that dispute, and the proceedings on the claim form relate to that dispute;
>
> (d) the proceedings are proceedings under Part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under section 128 of that Act or section

161 of the Trade Union and Labour Relations (Consolidation) Act 1992; or

(e) A is instituting proceedings against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.

(2) Where A benefits from the exemption in paragraph (1)(a), the requirement for early conciliation shall be treated as complied with for the purposes of any provision extending the time limit for instituting relevant proceedings in relation to that matter."

25. Where a claimant instituted Early Conciliation with one respondent, but after issuing proceedings against that respondent wished to add a second respondent, it is not a bar to the granting of that application that no conciliation was attempted with the second respondent ***Mist v Derby Community NHS Trust [2016] ICR 543.***

Discussion

26. The circumstances here are not identical with those in that authority of **Mist**, but may be analogous. There was one set of claim forms in the present claims in July 2020. The second set in December 2020 repeated much of the same allegations, but sought, inter alia, to add the third and fourth respondents. Having regard to that authority I considered that, subject to any argument that may be made, the third and fourth respondents were competently convened as respondents, and it was my judgment that it was appropriate to reconsider the rejection, and allow service of the Claim Forms.

27. For the avoidance of doubt nothing in allowing this reconsideration should be taken as preventing the third and fourth respondents from challenging the issues of jurisdiction on that or any other ground. If any arguments that the third and fourth respondents were not within the jurisdiction of the Tribunal are made, that can be addressed separately as and when so made by them.

28. I was initially not clear of the basis on which the claimants sought to convene the third and fourth respondents. They are members of the LLP which is the first respondent, and that fact alone is not sufficient to found

a claim against them as individuals, but it was explained by the claimants' representative that each had undertaken acts as an agent of the first respondent, on the claimant's arguments, and under sections 109 and 110 that conferred liability on them as individuals.

29. Whilst that is not pled as clearly as it might be, I consider that there is sufficient to permit the reconsideration to be granted and I direct that the Claim Forms concerned be served on the parties named thereon as third and fourth respondents.

"Barring"

30. The claimants applied to have the first and second respondents "barred", being the term that was used in the application, from further participation in the claims lodged in December 2020. It is not clear which Rule is sought to be relied on for that application.

31. Those December 2020 Claims have also had not a simple history. After the decision on 8 December 2020 the Claims were served on the first and second respondents. The second respondent had initially written to the Tribunal and claimants' representative seeking additional information but had not presented a Response Form within the original time to do so. The respondents were provided with a number of extensions of the time within which to provide a Response Form. Eventually the Response Forms were presented, although late, on 4 February 2021. The Response Forms were accepted on 5 February 2021, and sent to the claimants. There is no Rule providing for the barring of a respondent in such circumstances save for Rule 21 where no Response is submitted or allowed on extension, but there are provisions in Rule 20. I do not consider that that Rule applies, and in any event it is subject to the terms of Rule 21(3) such that the term "bar" does not correctly describe the provision. The Tribunal may permit some form of participation.

32. The Rules are also to be read subject to the overriding objective. A decision to allow the Response Form to be received, which was allowing the extension of time to do so, was made on 5 February 2021. It was not appealed. On the contrary, the claimants made a number of proposals on case management and other issues which were only consistent with the

December 2020 claims being defended, such as the combination of those claims and arrangements for the Final Hearing.

33. In any event, the December 2020 claims repeat a great deal of the terms of the original two claims presented in July 2020, in respect of which Response Forms for the two respondents were timeously submitted. The 2020 claims do include some additional matters after termination of employment and additional respondents, but the claimants' decision to repeat allegations in two sets of claim forms, and arguing that one set are defended and the other ought in effect not to be, provides an additional layer of complexity that militates very strongly against allowing the application, even if it were to be competent.

34. In all the circumstances it did not appear to me in accordance with the interests of justice under the overriding objective to grant the application made, and it is refused.

Further applications

35. There are a number of matters that are related to the Judgment above which are addressed in the Note referred to, issued of even date. That includes certain further applications including for strike out by the respondents which may be addressed at a further Preliminary Hearing on 18 May 2021.

Employment Judge: **Alexander Kemp**
Date of Judgment: **12 May 2021**
Date sent to parties: **19 May 2021**