EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109429/2021 (V)

Held on 5 October 2021

Employment Judge J M Hendry

Miss Y Fraser	**Claimant** **Not Present**
Highland Council	**Respondent** **Represented by** **Mr J Anderson,** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claims in relation to age discrimination, having no reasonable prospect of success are struck out;
2. The claims in relation to sex discrimination, having no reasonable prospect of success are struck out.

REASONS

1. The claimant made a series of claims arising from the termination of her employment by the respondent. The claims were denied in their entirety by the respondent. The case proceeded to a preliminary hearing on case management and thereafter to an open preliminary hearing on strike-out at the behest of the respondent's agents.

2. Prior to the preliminary hearing the respondent's Counsel intimated a skeleton argument setting out the basis of their position. On the morning of the hearing Mr Anderson was allowed to add to the grounds of strike-out a separate ground namely that the claim was not being actively pursued based on the claimant's failure to attend the hearing that morning.

Procedural background

3. It would be wise to note the procedural background that led up to today's hearing.

4. A case management hearing took place on 12 July 2021. The pleadings were discussed and it was suggested to the claimant that she would have to set out more clearly the basis of her case (paragraph 5 of the Note). The respondent sought a strike-out. No such Better and Further Particulars were lodged. I mention this by way of explanation. The claimant wrote to the Tribunal on 27 July indicating that she was trying to instruct a solicitor (no doubt to carry out this work). She failed to keep the Tribunal appraised of the position.

5. Date listing letters were then sent out in August to arrange a strike-out hearing. Listing letters sought availability for September and October.

6. The claimant returned the date listing letter indicating that she was free for the whole of October. Due to an error the notice of hearing was sent to parties on 20 August giving the hearing date of 5 November rather than 5 October which had been identified as suitable for both parties. The error was rectified a short time later and new Notices sent out giving the correct date of 5 October.

7. There was no further correspondence from the claimant until 27 September when she indicated that she would prefer the 5 November to remain as the

date. The claimant was advised on 28 September by the Tribunal that the hearing date was 5 October. There was no hearing listed for 5 November. The Tribunal advised her that if she could not attend she would have to make an application for postponement. On 28 September the claimant made an application for postponement but gave no reasons why she could not attend on 5 October or why she had not sought a postponement earlier or why she had not taken steps to ensure she was free on this date. The application was refused on 29 September. The Tribunal wrote rejecting the request and noting: "*there are no good reasons advanced to discharge the hearing. The dates listing letter confirms your availability for the 5 October*".

8. The claimant responded on 29 September. The letter was unintelligible. The Tribunal wrote on the same day indicating the claimant should set out what she wanted to happen clearly and in writing. The claimant wrote on 4 October indicating she would be responding in due course. On the same day she wrote to the Tribunal office advising that she was no longer available on 5 October. The Tribunal Judge wrote to the claimant on 4 October as follows:-

"*The Judge notes that you returned to the Tribunal your dates letter setting out the dates on which you would be available for a hearing. This was on 15 August. You marked the whole of October as being available for a hearing. The letter did not contain any proposed dates for November. The Judge assumes that as you are working you would arrange to take time off.*
Due to a typographical error the notice was sent out on 20 August given 5 November as the hearing. This was rectified on 2 September giving you more than a month to take time off. That notice provides advice as to how to seek a postponement.

The Judge has not granted your postponement. No good reasons have been given as to why you did not or cannot take the time off to take part in the hearing. Please explain by return why you did not challenge the new date earlier or arrange time off?"

9. The claimant did not respond. The respondent's Counsel opposed any postponement. She did not appear at the hearing despite having been sent the log in details.

10. The Tribunal had regard to Rule 47 and having revied the matter allowed the hearing to proceed.

Strike-out application

11. At the outset Mr Anderson asked it to be recorded that he accepted that the bar for strike-out particularly of discrimination claims was a high one. The power of the Tribunal to strike-out cases was contained in Rule 39 of the Employment Tribunal Rules. The Tribunal could strike-out "all or part of a claim" or make a Deposit Order in respect of "any specific allegation or argument in a claim". The threshold in respect of strike-out was "no reasonable prospect of success" and for a Deposit Order "little reasonable prospect of success."

12. He asked the Tribunal to consider the claimant's pleadings contained in the ET1 at their highest. The claim for discrimination appeared to proceed on the basis of direct discrimination in relation to the complaints of sex and age discrimination there was no stateable case before the Tribunal. In particular, a) there were no primary facts identified from which an inference of discrimination could be drawn and b) the height of any claims was simply to assert a difference in treatment. There was not "something more" (***C.F. Madarassy v. Nomura International Plc*** [2007] IRLR 246 and c) any comparator relied upon could not be in the same circumstances as the claimant.

13. Counsel pointed out that there was a brief reference to harassment in the Agenda but no reference in the ET1. There it appeared to be a repeat of the direct discrimination complaint.

14. Turning to the automatic unfair dismissal complaints these had not been clarified. It was not clear if the claimant was trying to come within the terms of s.100 or s.103A. There were unusual factors in relation to the unfair dismissal claim namely the claimant did not attend the disciplinary hearing and she withdrew her appeal from dismissal. In the light of this it would he

suggested be difficult to see how parties could be said to have a sensible basis for arguing that there was an ongoing relationship or how trust and confidence could be said to exist. In the alternative Mr Anderson asked the Tribunal to strike-out on the basis of the claimant's breach of the Orders to provide Better and Further Particulars. He observed that the case has not progressed in a period of over three months. In addition the claimant had failed to attend today and actively pursue her claim.

15. Mr Anderson's alternative position was that a Deposit Order would be appropriate. His position was that the claimant by failing to attend the hearing had directly prevented the Tribunal from exercising its requirement to ask her about her financial circumstances and this should not be a bar to the grant of a Deposit Order. I raised the question of the notice pay. Mr Anderson accepted that it would be up to the respondent to prove that the claimant's actions amounted to gross misconduct disentitling her to notice. He did not seek strike-out of this aspect of the claim.

Discussion and decision

The law

16. The respondent sought under Regulation 37 of the Employment Tribunals Rules of Procedure 2013 a strike out of the claim on the basis that it had no reasonable prospects of success. The powers of the Tribunal in relation to strike out are set out in that Rule which is in the following terms:

> "***37.***—*(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;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *(c)for non-compliance with any of these Rules or with an order of the Tribunal;*

(d)that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

17. It has been observed that the power of strike out is a draconian one and could only be exercised in rare circumstances. The effect of a successful strike out application would be to prevent a party proceeding to a hearing and leading evidence in relation to the merits of their claim. (**Balls v Downham Market High School & College [2011] IRLR 217 EAT**)

18. As a general principle discrimination cases should not be struck out except in very clear circumstances and the cases in which such claims are struck out before the full facts could be established are rare (**Chandhok & others v Tirkey [2015] IRLR 195 EAT**).

19. For the purposes of Rule 37(1)(a) a vexatious claim has been described as one that is not pursued with the expectation of success but to harass the other side out of some improper motive. Vexatious proceedings are those that have little or no basis in law and where the intention of the proceedings or their effect is to subject the respondent to inconvenience, harassment or expense out of all proportion to any likely gain. Such behaviour involves an abuse of process (**Attorney General v Barker [2000] FLR 759**).

20. Any of the complaints advanced are misconceived and have no legal basis they involve a bare assertion that the necessary legal requirements are not met.

Application for Deposit Order

21. In the alternative Mr Anderson submitted that the claims have little reasonable prospect of success and that a Deposit Order should be made if the case is

not struck out. The test is not as rigorous as "no reasonable prospect of success". The Tribunal's power to order a Deposit Order of up to £1000 for each specific allegation or argument (**Doran v Department of Work and Pensions UKEAT ES/0017/14**, **Van Rensburg v The Royal Borough of Kingston Upon Thames and others UKEAT/0096/07 and UKEAT/0095/07**, **Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0133/14**.

Discussion

22. The claimant in her ET1 "ticked" the boxes indicating she was making a claim for age and sex discrimination. She also made a claim for unfair dismissal referencing both protected disclosure and s.100 of the Employment Rights Act. Her narrative did not make it clear how these sections were engaged. It mentions in her paper apart that she had arranged a meeting with an HR Manager regarding "the Health and Safety risks of all car club drivers". The claimant also wrote:

"*I had no employment rights and was not protected from harassment or discrimination as others were who were younger and/or male employees who were not subject to detriment or dismissal in receiving management instructions but did not act upon them.*"

23. The claimant raised a grievance on 2 August. She wrote:-

"*The grievance referred to health and safety risks, financial irregularities, discrimination and whistleblowing and the DO not acting in accordance with the Council Policy or ACAS Code of Practice which he confirmed.*"

24. The claimant was dismissed after she had raised concerns on 8 January.

25. The claimant lodged an Agenda document prior to the case management discussion. At 2.3 dealt with any disclosure. The claimant identified the various interactions with the respondent's employees in relation to safety but does not indicate which of these are meant to amount to disclosures although

she uses the word ‘‘disclosed’’ in relation to various incidents (9 January 2020, 22 January 2020) but it is not clear if she is using this as indicating Protected Disclosures. There is really no pled basis for sex or age discrimination.

26. The claimant from her correspondence appears to be an intelligent and capable woman and it is disappointing that after the initial PH she has not sought to clarify her pleadings. I am conscious that this is not an easy matter for a layperson but she has not even attempted to do so. I note also that the order made did not have the usual warning attached in relation to non - compliance. Even absent an explanation for her failure and her non-attendance at today's hearing I would have been very reluctant to take the draconian step of striking the claims out on this basis alone. To do so would be disproportionate.

27. I then turned to consider the merits of the strike out looking at each head of claim and considering what written material the Tribunal had in the ET1 to underpin the claims made. In relation to the claims for sex and race discrimination as was pointed out in the PH Note unreasonable behaviour on it's own is not sufficient to point to any particular type of discrimination. The fact that the claimant was older than other employees who, she says, were treated differently is not enough. She has to tell us why she thinks her treatment related to her sex or age and has not done so. I am, therefore, persuaded that this is one of the exceptional cases in which Strike out is appropriate. These claims for sex and age discrimination appear to not have any reasonable basis and are struck out.

28. The claimant does not have two years' service entitling her to claim ‘‘ordinary’’ unfair dismissal. She makes reference to Section 100 of the Employment rights Act which if engaged would allow her to make such a claim irrespective of her lack of service. That Section says:

“***100 Health and safety cases.***

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

29. It is not said which section the claimant relies upon. It might be assumed to be Section 100 (c) as this perhaps fits the narrative but she does not say so. Nor does she say why the section applied namely that there is no safety committee to take up cudgels on her behalf. It may be that she relies on s.103A but this is not clear either.

30. Similar issues can be taken with the question of Protected Disclosures. The claimant has to say what they were and to whom they were made and when. The respondent is entitled to examine each disclosure and test if it complies with the statute. There is guidance in the case of ***Blackbay Ventures Ltd T/A***

Chemistree v Gahir UKEAT/0449. However, the claimant does provide a relatively full narrative of what she says happened using the word disclosure at one point. In these circumstances, I think a proper distinction can be drawn with the claims for sex and age discrimination. She also makes reference to her grievance and it may be that this is sufficient to constitute a PID.

31. However, these are in some sense rather technical matters although essential to success. In the round I take the view that the claimant may have pled sufficient facts which, with some appropriate additional specification, engage either of the statutory protections. I am not prepared to hold that there is no reasonable prospects of success, at least at this, stage. The claimant should have the opportunity of rectifying these matters and I think that it is in accordance with the overriding objective to give her **14 days from the date of this Judgment to provide Better and Further Particulars addressing these concerns**. A formal Order to this effect is made. This will also allow her an opportunity of giving the Tribunal details of her financial position (Rule 39(2)) which it can consider if making Deposit Orders. At that point I am prepared to consider the applications for Deposit Orders if they are still insisted upon.

Employment Judge **Judge J M Hendry**

Dated **14 October 2021**

Date sent to parties **14 October 2021**