EMPLOYMENT TRIBUNALS

Claimant: **Ms B Washington**

Respondents: **Swindon Borough Council (1)**
Governing Body of EOTAS (2)
Mr E James (3)

RECORD OF A PRELIMINARY HEARING

Heard at: Bristol (By CVP) **On:** 10 January 2023

Before: Employment Judge Self

Appearances
For the Claimants: In Person
For the Respondent: Mr A Francis - Counsel

RESERVED JUDGMENT ORDER

1. All Claims pursuant to section 44 of the Employment Rights Act 1996 are struck out as having no reasonable prospects of success.
2. All harassment claims are considered to have little reasonable prospects of success and a Deposit Order in the sum of £75 per factual allegation is made.
3. All other applications for a Deposit Order and/or strike out order are dismissed.
4. This matter will be listed for a further Open Preliminary Hearing to deal with:
    a) Whether or not the remaining claims have been brought within the respective statutory time limits and, if not, whether time should be extended to the statutory test.
    b) Whether the meeting on 14 July 2020 and discussions therein were without prejudice and, if so, whether the without prejudice privilege should be lifted and if not whether the victimisation claims have no or little reasonable prospects of success.

c) Any further directions required and to list any remaining matters for a final hearing.

5. That hearing will take place by way of CVP on **20 July 2023** with a time estimate of one day before EJ Self if possible.

6. The Respondent is to produce a bundle agreed with the Claimant by no later than **22 June 2023** (limited to 250 pages) and the parties are to exchange witness statements in relation to the issues to be determined at this hearing (limited to 1500 words each) by **6 July 2023**.

WRITTEN REASONS

1. By a Claim Form dated 10 February 2022 the Claimant brought Claims against Swindon Borough Council, the Governors of EOTAS and Mr J Evans. The Claimant had been employed as a teacher and her employment had commenced on 19 April 2021. In her Claim form she marked boxes indicating that she was bringing claims of Disability Discrimination, Pregnancy / Maternity Discrimination and Sex Discrimination as well as asserting she was owed arrears of pay. The particulars of Claim ran to 38 pages and 291 paragraphs The Claimant lodged two documents which were said to "Clarification of Particulars and these documents were sent in on 4 May 2022 and 5 July 2022 respectively.

2. The claim came before EJ Livesey on 26 October 2022 and he identified the Claims to be the discrimination matters detailed above and detriment claims on the grounds of health and safety and additionally on the grounds of pregnancy. EJ Livesey brought order to the proceedings and was able to set out within his order a List of Issues, which was agreed by the Claimant and the Respondent. Those issues are set out below.

3. It was also recorded that the Claimant had indicated that she wished to add a Race Discrimination Claim and a Whistleblowing Detriment Claim. EJ Livesey provided a clear steer to the Claimant as to the level of detail that was required for such claims to be considered at paragraphs 39 and 40 of his Case Management Order.

4. This matter was listed to consider any application for an amendment and following that a final determination of the issues and to consider an application under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) 2013, Schedule 1 (the Rules) to consider whether any of the Claims should be struck out as having no reasonable prospect of success or whether a deposit order should be made pursuant to Rule 39 of the Rules.

5. On 1 November 2022 the Claimant indicated that she no longer wished to seek to amend her Claim so as to include a race discrimination claim or a whistleblowing claim and confirmed that none of the other matters raised in that November 2022 document was intended to add more claims save in one respect in relation to the unlawful deduction of wages claim.

6. In that Claim the Claimant who, as at the date of this hearing, remained an employee of the Respondent, is asserting that she is being underpaid contrary to the Employment Rights Act 1996 every month and so her loss is an ongoing one. That is denied by the Respondent but recognised that that is the case she puts forward for consideration. It was agreed that rather than continue to have applications to amend and /or the Claimant initiate new claims it is understood that the unlawful deduction of wages claim continues to accrue and no further amendment applications will be required so as to bring the total claimed up to date. The parties understand that the claim under this head will be calculated as at the date of final determination.

7. The List of issues was to be finalised at this hearing and following further information provided it is agreed by the parties that the Issues moving forward will be:

1. The identity of the Respondents

1.1 Who was the Claimant's employer for the purposes of her claims as a result of the effect of the Education (Modifications of Enactments Relating to Employment) Order 2003;

1.1.1 Did the Second Respondent have a delegated budget within the meaning of paragraph 3?

1.2 If the Order applied, did it apply to all of the Claimant's claims (see the Schedule). If not, what was the effect?

2. Time limits

2.1 The claim form was presented on 10 February 2021. The claimant commenced the Early Conciliation process with ACAS on 22 December 2021 (Day A). The Early Conciliation Certificate was issued on 1 February 2021 (Day B). Accordingly, any act or omission which took place before 23 September 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

2.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
2.2.2 If not, was there conduct extending over a period?
2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
2.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
2.2.4.1 Why were the complaints not made to the Tribunal in time?
2.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2.3 Was the unauthorised deductions and/or detriment complaints made within the time limit in section 23 and/or 48 of the Employment Rights Act 1996? The Tribunal will decide:

2.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of and/or date of payment of the wages from which the deduction was made?
2.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
2.3.3 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
2.3.4 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
2.3.5 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. Detriment (s. 44 Employment Rights Act)

3.1 Did the Claimant on 17 May 2021 leave her place of work and/or refuse to return to it in circumstances of imminent danger within the meaning of s. 44 (1A)(a)?

3.2 If so, did she suffer the following detriments as a result of her actions;

3.2.1 A drop in pay from full pay to half pay (7 December 2021) and then nil pay (August 2022);
3.2.2 An inability to complete an NASENCO course resulting in further financial loss;
3.2.3 An inability to benefit from pay progression to UPS1 in September 2021;
3.2.4 A threat but she would not be paid when she attended antenatal appointments by Ms Preedy on 9 June 2021

4. Disability

4.1 The Claimant's asserted disability, Type 1 diabetes, has been admitted.

5. Pregnancy and Maternity Discrimination (Equality Act 2010 s. 18) and/or detriment (Employment Rights Act s. 47C)

5.1 Did the Respondent treat the Claimant unfavourably by doing the following things and/or act in breach of s. 47C in relation to her pregnancy:

- 5.1.1 Failed to implement the control measures set out in the risk assessment which suggested that her standing time should have been limited, that breaks should have been provided within the timetable and/or that she should have been afforded a full lunch break;
- 5.1.2 Failed to review the risk assessment;
- 5.1.3 Failed to progress the Claimant to UPS1 and September 2021;
- 5.1.4 Required the Claimant to obtain permission to have an antenatal appointment.

5.2 In the case of s. 18, did the unfavourable treatment take place in a protected period?

5.3 If not did it implement a decision taken in the protected period?

5.4 Was the unfavourable treatment because of the pregnancy?

5.5 Was the unfavourable treatment because of illness suffered as a result of the pregnancy?

5.6 Was the unfavourable treatment because the Claimant was on compulsory maternity leave, was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave and/or related to pregnancy within the meaning of s. 47C?

6. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

6.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs and physical features:

- 6.2.1 The physical features of the Claimant's workplace;
- 6.2.2 The provision of ½ a day's leave for antenatal appointments.

6.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that;

6.3.1 There was nowhere for her to change her cannula and/or sensor which was private and hygienic;

6.3.2 Due to the complications associated with her pregnancy because of her disability, antenatal appointments required her to take more than ½ a day of leave.

6.4 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

6.5.1 The provision of a private, hygienic room;

6.5.2 The provision of a full day of leave to attend antenatal appointments.

6.6 Was it reasonable for the Respondent to have to take those steps and when?

6.7 Did the Respondent fail to take those steps?

7. Harassment related to sex and/or disability (Equality Act 2010 s. 26)

7.1 Did the Respondent do the following things:

7.1.1 All of the allegations brought under the Equality Act and/or s. 47C are also alleged to have been acts of harassment;

7.2 If so, was that unwanted conduct?

7.3 Did it relate to the Claimant's protected characteristics, namely disability and/or sex (due to maternity)?

7.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. Victimisation (Equality Act 2010 s. 27)

8.1 Did the Claimant do a protected act as follows;

8.1.1 Brought her second grievance of 10 June 2021.

8.2 Did the Respondent do the following things:

8.2.1 Threatened the Claimant with an investigation for gross misconduct (the Third Respondent to the Claimant's union representative on 14 July 2021);

8.2.2 An individual filed a grievance on 14 July 2021 against the Claimant in relation to the second grievance, albeit that that individual was not identified due to the redaction of the name from a SOR or FOI request.

8.3 By doing so, did the Respondent subject the Claimant to detriment?

8.4 If so, was it because the Claimant had done the protected act?

9. Unauthorised deductions (Part II of the Employment Rights Act 1996)

9.1 The Claimant complains of the following deductions;
9.1.1 Unpaid pay progression from 1 September 2021;
9.1.2 Half pay from 12 December 2021 followed by nil pay in June 2022.

The Law

8. An Employment Judge or Tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds pursuant to Rule 37 (1) of the Tribunal Rules. There are a number of grounds upon which a claim can be struck out but in this case we are looking at subsection (a) only i.e., that the Claim or part of the Claim "***has no reasonable prospect of success"***.

9. The power to strike out all or part of a claim or response is discretionary. Even if one of the five grounds in r 37(1) is made out, the Tribunal must consider whether to exercise their discretion or make an alternative order. 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 or response (or part thereof).

10. Lady Smith in ***Balls v Downham Market High School and College*** **UKEAT/0343/10** said at paragraph 6 of that Judgment:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it

shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

11. Once a claim /application has properly been identified, the power to strike it out under the Tribunal Rules) on the ground that it has no reasonable prospect of success will only be exercised in comparatively rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755, at [30])**. In particular, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute as often a hearing is required where evidence is challenged and evaluated. (**Tayside**). As such, a Claimant's case must ordinarily be taken at its highest – with the assumption being that the Claimant will establish that the facts which they have asserted in their claim are true, however vehemently the other side takes issue with them. Taking the claim at its highest means taking it at its highest not just in the pleadings but in any relevant supporting documentation available to the tribunal.

12. It is also important that the reference to 'disputed facts' is not limited to disputes about factual events (what happened) but also covers disputes over the reasons why those events happened, where that is relevant to the legal claim that has been brought. There will therefore be a crucial core of disputed fact in a case which turns on why a decision maker acted as they did, and the parties have competing assertions on those reasons, even where there is no dispute as to how that decision maker acted and what they in fact did. Where a claim will turn on the question of how a decision maker evaluated disputes of fact, and precisely what conclusions they reached, these are matters that can only be resolved at a full hearing.

13. It is not impossible for a claim which involves disputed facts to legitimately be struck out as having no reasonable prospect of success, but it will be an exceptional case where this is justified (see **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603**), An example, however, where a strike out may be appropriate

notwithstanding a dispute of fact is where 'it is instantly demonstrable that the central facts in the claim are untrue' (see **Tayside)**. The qualification that it must be 'instantly demonstrable' that the pleaded facts are untrue is significant – it must be possible to quickly and decisively show that the central foundations of the Claimant's case are untrue for a strike out to be warranted.

14. It is not enough that with further time and examination (whether of witnesses or documents) it is likely that the claimant's assertions will be shown to be untrue. Thus, where the assertions made in the claim are contradicted by plainly inconsistent documents, that will provide a basis for a Tribunal to strike out a claim as having no reasonable prospect of success; or, as it was put in **Ezsias**, where the facts sought to be established by the Claimant were ***'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'*** (at [29], per Maurice Kay LJ).

15. All Claims and parts of Claims are subject to the same principles regarding strike out and, of course, the same wording of **Rule 37 (1) (a)**. There has been a line of cases, however, that makes it clear that as discrimination and whistleblowing cases in particular, commonly turn on matters such as the mental processes of decision makers and inferences to be drawn from behaviour, as well as credibility of witnesses, and may involve a reversal of the burden of proof, they are particularly unsuitable for resolution at a preliminary stage on a strike out application.

16. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391**, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

17. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126, CA**, the Court of Appeal held that the same or a similar approach should generally inform protected disclosure (‘whistleblowing’) cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. The Court stressed that it will only be in an exceptional case that an application 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 claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

18. in **Hemdan v Ishmail and anor 2017 ICR 486, EAT**, Mrs Justice Simler (President of the EAT) observed that the purpose of a Deposit Order was to identify, at an early stage, claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed. That was a legitimate policy, because claims or defences with little prospect caused unnecessary costs to be incurred and time to be spent by the opposing party. They also occupied the limited time and resources of tribunals that would otherwise be available to other litigants. However, their purpose was not to make it difficult to access justice or to effect a strike-out through the back door. The requirement to consider a party's means in determining the amount of a deposit order was inconsistent with that being the purpose. It was essential that when a deposit order was deemed appropriate it did not operate to restrict disproportionately the fair trial rights of the paying party or impair access to justice. Accordingly, an order to pay a deposit had to be one that was capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum that he or she was unlikely to be able to raise.

19. The threshold for making a deposit order is that the Tribunal must be satisfied that there is 'little reasonable prospect' of the particular allegation or argument succeeding.

20. Rule 39(1) of the Tribunal Rules 2013 allows a tribunal to use a deposit order as a less draconian alternative to strike-out where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success. The test of 'little prospect of success' is plainly not as rigorous as the test of 'no reasonable prospect'. It therefore follows that a tribunal has a greater leeway when considering whether to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response — **Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors EAT 0096/07**.

21. Even if a Tribunal concludes that a claim or allegation has little reasonable prospect of success then it does not automatically follow that a deposit order must be made. The Tribunal retains a discretion in the matter and the power to make such an order under Rule 39 has to be exercised in accordance with the overriding objective — to deal with cases fairly and justly — having regard to all of the circumstances of the particular case.

22. The Respondent made full written submissions and then supplemented those orally. The Claimant made oral submission of which a comparatively small amount were pertinent to the points in hand. I sought to bring the Claimant

back on point, for her own benefit on a number of occasions. Whilst not outlining the points made by either party I have taken all representations both oral and written into account

23. Section 44 Detriment Claims

A strike out Orders will be made in relation to these claims. I consider that the Claimant will not to be able to demonstrate the prescribed reason for both leaving the premises on 17 May and also for not returning and that the claims have no reasonable prospect of success.

24. The Claimant needed to leave that day as she says in her first grievance to attend an appointment vis a vis her antenatal care. The Claimant states that she was ***"not able to leave until 1435 because I had no TA for afternoon registration and had not been able to go to the loo until 1220***." The Claimant on her own account did not leave at the time she needed to because of the needs of the school. That is complete contrast to her leaving because of a serious and imminent danger. In fact she was going to leave earlier but stayed on longer because she had to.

25. That is contained in a document filed just after the incident (the first grievance). The Claimant needed to leave to go to an appointment but because of the situation in the school actually left 35 minutes later. The Claimant did not return but there is no evidence to support the fact that it was because of a serious and imminent danger and the Respondent's submissions between paras 27 and 29 of their skeleton are accepted. I have considered the Claimant's case at its' height and I am satisfied that the Rule 37 threshold is met and I can see no reason why a strike out order should not follow.

Pregnancy and Maternity Discrimination

26. These claims will depend on the thought processes of those who allegedly made the various decisions. Whilst I acknowledge that there is some force in the Respondent's position I do not accept that those claims are "implausible to the point of absurdity" and will need to be heard on their merits with evidence from both sides. It may well be that once all of that is in place the paucity of the Claimant's position is laid bare as the Respondent predicts or alternatively that the Claimant can demonstrate one or all of them. I am mindful of the caution advised by the appeal courts in fact sensitive discrimination cases and that the claimant's case should be taken at its height and in those circumstances decline to strike out this claim. In addition I decline to make a deposit order on it either.

Reasonable Adjustments

27. The Respondent seeks to have these matters subject to a deposit order because they are prima facie out of time. Whilst I agree that it does look as if those claims have been lodged outside of the time limit I remind myself that there is a very wide discretion in relation to the just and equitable extension which is utilised widely. Due to the breadth of that discretion I am unable to say that that there is little reasonable prospects of success at a time limits

hearing and I decline the opportunity to make a deposit order. It seems to me that a far more appropriate course is to schedule a time limits hearing at which a substantive determination of that issue can be made. That could have been applied for to run in parallel with the applications today. That will provide an early determination either way.

Harassment Claims

28. I am satisfied that these claims have little reasonable prospects of success and made a deposit order in relation to each of the heads of claim. The Claimant has not been at work and a drop to half and then nil pay is a standard contractual outcome. I agree with the Respondent that these allegations have been shown to have no evidential support at this stage, despite the huge amount of documentation and are mere assertions of a discriminatory state of affairs. I also agree that they are extremely difficult to characterise as falling within the statutory definition of harassment. For those reasons a deposit order will be made.

29. There are four claims and a deposit order of £75 per factual allegation will be set taking into account the Claimant's finances as described to me at the hearing. The Claimant owns her property with a mortgage and it some equity in. She lives with her husband and 2 children and her husband works part time and the family are currently reliable on benefits as well. There are no savings but there is a credit card and overdraft. The Claimant did not provide any supporting evidence of her finances. £75 is sufficient to be meaningful to the Claimant but at the same time would not act as a bar to any claim she specifically wishes to run. The Claimant is reminded that she may choose not to proceed with all harassment claims. If she pays £75 for any particular factual claim then she would be permitted to pursue that under both disability and sex.

Victimisation

30. I acknowledge that the Claimant herself has referred to the meeting of 14 July as being a "protected conversation". Section 111A Employment Rights Act 1996 would only be relevant for an unfair dismissal claim and so the real issue here is whether or not there was a without prejudice conversation. At para 114 of her Claim Form the Claimant does make some reference to why protection should not be conferred. I accept what the Respondent says about the high test for removing the protection afforded by a without prejudice conversation but for the view that the most appropriate way of dealing with that is to hold a further preliminary hearing in order to deal with that point in turn and to provide a full argument on that point and to make a substantive decision one way or the other. I decline to make a deposit or an order striking out the victimisation claims.

Unlawful deduction of wages claim

31. It seems to me that this claim is fact sensitive and should be considered at a hearing. I understand the concerns that the Respondent holds but do not find that it meets the criteria required for either a strike out or a deposit order.

Conclusion

32. I will make arrangements for a further one day Open Preliminary Hearing to take place at a point in time after the time for deposits has passed. That hearing will deal with:

a) Any suitable time limit claims
b) The without prejudice issue / victimisation claims
c) Any other case management matters
d) Listing for a final hearing.

33. For continuity purposes I prose to retain this matter if possible but if either party objects to that they should write in with reasons why not and I will consider whether to place within the general pool of Judges.

34. In summary:

a) Health and Safety Claims are struck out
b) Harassment claims are subject to deposit orders
c) All other claims to continue to be continue and will be considered in relation to whether they have been brought in time / without prejudice issues (victimisation).

Employment Judge Self
Date: 4 April 2023

Judgment sent to the parties: 05 April 2023

For the Tribunal Office