EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000299/2023

Preliminary Hearing held remotely on 22 November 2023

Employment Judge A Kemp

Ms S Lopez-Perez	**Claimant** **In person**
Scottish Ministers	**Respondent** **Represented by:** **Mr B Nichol** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Tribunal refuses the respondent's application under Rule 37 for a strike out of the Claim.**

2. **The Tribunal refuses the respondent's application under Rule 39 for an order that the claimant pay a deposit.**

REASONS

Introduction

1. This was a Preliminary Hearing which was held to consider applications made by the respondent for strike out which failing a deposit order, and separately to address a further application for a Preliminary Hearing to be fixed on the issue of jurisdiction (which is addressed by separate Note). The hearing was held remotely. The claimant is a party litigant and the respondent was represented by Mr Nichol.

2. The claims being pursued are direct discrimination on grounds of sex and disability under section 13 of the Equality Act 2010. The claimant remains employed by the respondent, which denies the claims. Disability status and knowledge actual or imputed is not admitted. In discussion the claimant referred to what was possibly a claim of discrimination arising out of disability, which is a claim under section 15 of the 2010 Act, but that had not been identified as a claim at the last Preliminary Hearing before me, and I explained that if it was to be pursued an application to amend may be required.

3. That Preliminary Hearing had taken place on 25 August 2023. The Note I issued set out the dates for early conciliation which commenced on 19 April 2023, with the certificate issued on 23 May 2023 and the Claim Form issued on 23 June 2023. After that hearing the claimant, following extensions of time, produced a document with Further and Better Particulars of her claims, along with a Schedule of Loss and Disability Impact Statement. She withdrew her claims as to pregnancy and maternity, which were dismissed under Rule 52 on 29 September 2023.

4. The present hearing was fixed to address an application for strike out which failing for a deposit order made by the respondent, in response to the Further and Better Particulars, by email on 16 October 2023, in which it also provided an amended Response. That application led to this hearing being fixed, and intimated to the parties on 5 November 2023.

5. On 15 November 2023 the respondent emailed the Tribunal and claimant to seek to add to the hearing the issue of jurisdiction in relation to timebar. A reply was sent on my instructions that day stating that I did not consider that to do so at such short notice where evidence would be required and where the claimant was a party litigant was in accordance with the overriding objective, but that the matter could be canvassed at the conclusion of this hearing.

6. The claimant emailed the Tribunal on 20 November 2023 setting out her position, and referring to the fact that she had not yet secured legal representation through her union. I explained at the start of the hearing the issues that arose and the process that would be followed, and

indicated that the claimant's financial circumstances were relevant in the event that a deposit order was granted.

Submissions

7. The following contains a very basic summary of the submissions that were made.

(i) *Respondent*

8. Mr Nichol for the respondent, in a conspicuously professional and fair manner, argued in brief summary that the claims had no reasonable prospects of success. He founded on his emails referred to above and the amended Response Form. It was accepted that there was a high threshold to pass for the Tribunal to strike out such a claim. It was contended that the claimant had not pled any proper comparator, and that she had been seeking a voluntary move in March 2023 which could not be a basis for direct discrimination. There were not sufficient facts pled to found a case under section 13 on grounds of sex. There had been nothing pled as to knowledge of disability status on the part of individuals who had been referred to, although raised in the Note and the pleadings were insufficient to form a basis to lead to there being a dispute on fact for the claim pled under section 13 on the basis of disability. Time-bar remained an issue and was a factor as the pleadings to support it were not present. There was nothing pled that could amount to conduct extending over a period, as understood in authority. A just and equitable extension had not been pled, but had been mentioned in the Note. Mr Welsh had retired in January 2023, but had ceased to be the line manager in September 2019 when he moved role. There would be prejudice to the respondent such that it was not just and equitable to extend jurisdiction. It was proportionate to strike out the claim. If not struck out a deposit order should be made.

(ii) *Claimant*

9. The claimant argued that she had provided comparators. The comparators who were female were those for the direct disability discrimination claim. She argued that there was an hypothetical comparator for the sex discrimination claim being a male with childcare responsibilities. She

argued that there had been conduct extending over a period, with Ms Wright as Head of Division being aware of matters throughout and the line manager of her own line manager, and that there had been patterns of behaviour. She denied that she had voluntarily sought a move of role. She accepted that she may not quite have understood the tests in law, but had done what she could. She had provided details of knowledge of the respondent, and Mr Walker was aware of it as she had told him (albeit that was not clearly pled). She set out details of her financial position at my request. She had explained that she was seeking legal advice from her union but a decision on that had not been made as yet.

The law

10. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
>
> 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."

(i) Strike out

11. Rule 37 provides as follows:

> "**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
>
> (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……
>
> (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)."

12. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***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' (paragraph 19).

13. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

> "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. 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."

14. Lord Hope of Craighead stated at paragraph 37:

" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

15. Those comments have been held to apply equally to other similar claims, such as to public interest disclosure claims in ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603***. The Court of Appeal there considered that such cases ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits. The following remarks were made at paragraph 29:

“It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence.”

16. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

“Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian ***(Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu

> trial of the facts (***ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51*****,** Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (***ED & F Man … ; Ezsias …).*** But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (***Ezsias*** … Maurice Kay LJ, at para 29)."

17. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

18. That it is competent to strike out a discrimination claim was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias stated that

> "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."

19. If it is not possible for the claim to succeed on the legal basis put forward it may be struck out – ***Romanowska v Aspiration Care Ltd UKEAT/0015/14.***

20. In ***Mechkarov v Citi Bank NA [2016] ICR 1121*** the EAT summarised the law as follows:

> "(a) only in the clearest case should a discrimination claim be struck out;

(b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;

(c) the claimant's case must ordinarily be taken at its highest;

(d) if the claimant's case was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it could be struck out;

(e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

21. A further summary of the law as to strike out was provided by the EAT in ***Cox v Adecco and others [2021] ILEAT/0339/19.*** It referred to the level of care needed before a claim was struck out, with commentary also on the difficulties faced by a litigant in person (known in Scotland as a party litigant), as the claimant in that case was, in seeking to address matters at an oral hearing.

(ii) Deposit

22. 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….."

23. The EAT has considered the issue of deposit orders in ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14, Hemdan v Ishmail [2017] ICR 486*** and ***Tree v South East Coastal Services Ambulance NHS Trust UKEAT/0043/17***. In ***Tree*** 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."

Discussion

24. I did not make an immediate decision on the competing arguments as I wished to take time to reflect on the position and the arguments made. In each case the decision involves exercising a discretion, and there are arguments both ways. I deal with each matter in turn:

(i) Strike out

25. The test for strike out of a claim of discrimination is a high one, as was recognised. There are a number of competing factors. The claimant is a party litigant. Her Claim Form, and Further and Better Particulars are not particularly focussed on the legal issues that the claims engage. It is not clear that she has always a full understanding of the legal tests that apply to such claims, which is perhaps unsurprising given that she is not a lawyer and that the issues are not simple ones.

26. If however one reads both the Claim Form and Further and Better Particulars there is I consider just sufficient that could, if the facts are established in evidence, lead to a finding in the claimant's favour. There is clearly a dispute over what the correct comparator is. The respondent's view may prevail. But it is a question of fact initially as to what is established in evidence, and then a question of the true hypothetical comparator for the direct sex discrimination claim, and whether or not the actual comparators proposed for the direct disability discrimination claim are appropriate. The respondent's position may be right, or not, but it is an issue that is I consider to be decided once factual disputes are resolved. More generally discrimination claims are fact sensitive. The initial onus of proof falls on the claimant, but it may shift if a prima facie case is

demonstrated. Whether or not that has been done is a decision better taken after evidence has been heard, rather than purely on the basis of pleading.

27. There is an issue of time-bar that applies to any act or omission founded on prior to 19 January 2023 unless firstly there is conduct extending over a period to that date or secondly it is just and equitable to extend jurisdiction. The claimant alleges that there was such conduct extending over a period to March 2023.

28. The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period in what is generally regarded as the leading case on this question ***Hendricks v Metropolitan Police Commissioner***, ***[2003] IRLR 96***). The principle in that case was applied in ***Hale v Brighton & Sussex University Hospitals NHS Trust UKEAT/0342/16*** in which the respondent's contention that there were time limits each applying to discrete acts in relation to a disciplinary process was not correct and that there had been conduct extending over a period. That tends I consider to support the view that the issue is one dependent on the facts of the case. This is very far from an exhaustive summary of authority.

29. The claimant may or may not be right on the issue of conduct extending over a period. The pleading is somewhat succinct. It is certainly a factor to consider that there appears to be a gap in time of about a year or so from the last matter founded on before that date, in about early 2022, and March 2023. That there are different people involved, with different acts, is a further factor. But these are not determinative matters it appears to me, and I consider that the issue depends on exactly what is established in evidence. Whilst the pleadings are not full there is I consider just sufficient in this context. Whether there is evidence sufficient to establish that, and whether to allow evidence where the pleadings are as they are, is however a matter best left to determination at the Final Hearing itself, when if an objection to a particular question or chapter of evidence is made a decision can be taken on the basis of what is known at that time.

30. Putting it simply, it appears to me that there is in these and other respects a core of disputed fact, and that it would not be appropriate to strike out the claim under the overriding objective That is all the more so where the claimant is a party litigant who is seeking but has not yet received legal advice. It is possible that with such advice she can seek to lodge a second set of Further and Better Particulars. I was not able to advise her on that, as that is impermissible for a Judge, but from what was said further specification of her claims is at least possible. In other words the claims made may yet have merit, or further merit.

31. In so far as the claimant mentioned a claim for what is potentially a claim under section 15 of the Equality Act 2010 that may require an application to amend, which if made the respondent would be able to oppose, but that process has not yet taken place and at this stage it would not be appropriate to comment further on it beyond stating that it is a possibility that such an application might be made and then determined.

32. There is a public interest in having such claims as this determined, and I have concluded that this matter did not meet the high test for strike out, as it was not one of those exceptional cases where that was appropriate, and that even if it did that it was not in accordance with the overriding objective to strike it out in all the circumstances. I therefore refused the application.

(ii) Deposit order

33. The claims pursued are for direct discrimination, and the issue of a deposit order, where the test is as set out above, caused me greater difficulty. I have concluded that the claimant's claims cannot be said at this stage to have little reasonable prospects of success. There is a core of disputed fact, as set out above. The respondent's position was clearly set out, and entirely understandable from their perspective. Their position may be held to be correct once the evidence has been heard but at this stage I am unaware of what facts will be established after hearing all the evidence. A claim under section 13 is dependent on causation being established, and that may not be easy for the claimant to succeed with, but the test, whilst not as high as for strike out, is not without a degree of height.

34. The pleadings are limited, but in my view are there as set out above. Pleadings in a Tribunal are not the same as those in court. The formal requirements for pleadings in the employment tribunal were described as "minimal" by the Court of Appeal in ***Parekh v London Borough of Brent [2012] EWCA Civ 1630***. In ***Sougrin v Haringey Health Authority [1992] IRLR 416*** the same court had earlier stated that "a Tribunal should not take a narrow or legalistic view of the terms in which the complaint is couched." The EAT in ***Chandhok v Tirkey [2015] IRLR 195*** stated that the Claim Form "serves not only a useful but a necessary function. It sets out the essential case."

35. I am not I consider able to make a judgment that the claim has little reasonable prospects of success, for reasons similar to those in respect of strike out. In any event, in all the circumstances it does not appear to me to be in accordance with the overriding objective to grant a deposit order even if there had been a view that there were little prospects of success, having regard to the authority quoted above.

36. I have therefore concluded that it is not in accordance with the overriding objective to make a deposit order.

Conclusion

37. The application for strike out is refused, and the application for deposit order is also refused. For the avoidance of doubt these decisions are very far from saying that the claimant is likely to succeed with the claims, in whole or in part. No opinion is expressed on whether the claims will succeed or fail in whole or part.

Employment Judge: **A Kemp**
Date of Judgment: **01 December 2023**
Date sent to parties: **04 December 2023**