EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111111/2019

Open Preliminary Hearing Held by Cloud Video Platform (CVP) on 14 July 2021

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Employment Judge A Strain

Mr P Costello	**Claimant** **In Person**
Glasgow City Council	**Respondent** **Represented by:** **Ms G O'Neil – Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that:

(1) the claims under the Equality Act 2010 advanced by the claimant are struck out for non-compliance with orders of the Employment Tribunal

REASONS

30 **Background**

1. The claimant represented himself. He asserted (amongst others) claims under the Equality Act 2010.

2. The respondent was represented by Ms G O'Neill, Solicitor.

3. The issue for determination by the Tribunal was whether or not the claims under the Equality Act 2010 advanced by the claimant should be struck out for non-compliance with orders of the Employment Tribunal.

4. The parties had lodged an Agreed Joint Bundle of Documents with the Tribunal.

5. Both Parties made submissions.

The Relevant Law

6. A Tribunal is required to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals 10 (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.”

7. Strike out 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— (c) for non-compliance with any of these Rules or with an order of the Tribunal.”

8. 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 15 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).

9. 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."

10. 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." 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."

11. 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)."

12. 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. 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."

13. 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."

5 **Discussion and Decision**

14. The test for strike out is a high one. In this case it is asserted that the claimant has failed to comply with orders of this Tribunal dated 14 July 2020, 8 August 2020 and 8 January 2021 for specification of his claims of disability discrimination. A year has passed and it is asserted that he has
10 still not complied.

15. The Tribunal considered the history of the case as set out in Judge Kearns PH Note of 22 April 2021 paragraphs 2 – 7. Judge Kearns clearly narrates the orders made and the claimant's response (or lack thereof). This Tribunal has considered the orders, the responses and agrees with Judge
15 Kearns' analysis and comments.

16. At the PH on 22 April 2021 Judge Kearns asked the claimant what the answers were to the questions that had first been posed at the PH on 14 July 2020; the what, when, where, who and why of his discrimination claims.The claimant's response was that he had put his case acrosss for
20 discrimination, bullying and harrassment in 70 emails to the Tribunal. Judge Kearns comments that at the time the claimant was unclear as to the dates of the emails. This Tribunal had a similar experience with the claimant at this PH. His position was that he had provided the information requested and that the respondent had hindered or delayed the provision
25 of information that he needed to advance his claim.The claimant was particularly unclear as to the relevance of the information he had requested to the information he had been ordered by the Tribunal to provide.

17. Judge Kearns did not have a copy of the PH Note of 8 January 2021 when she heard the PH on 22 April 2021. This Tribunal has had the benefit of
30 considering the PH Note of 8 January 2021**.** The claimant was ordered, once again, to provide further specification of his claims in the form of a Scott Schedule (which was provided to him). The order went into

coniderable detail as to the information required. It also warned the claimant that if the order was not complied with his claim may be struck out under Rule 37. The Note attached to the order narrates that the Employment Judge went to some length to explain to the claimant the need for him to set out the basis of his claim in order to give the respondent fair notice of the case against them. The Employment Judge clearly explined to the claimant that if he failed to specify the claims then this could lead to them being struck out. The claimant was given until 26 February 2021 to comply with the orders.

18. Following the PH Note and Orders of 8 January 2021 the only correspondence the claimant appears to have had with the Tribunal are the emails of 12, 25 & 26 January 2021,12 February 2021(all of which were in the PH Bundle before the Tribunal). These emails do not provide the information requested by the orders of 8 January 2021, instead they appear to be attempts to obtain rather unspecific documention from the respondents. The claimant was asked by the Tribunal to clarify the informtion he sought by letters of 20 January 2021 and 3 February 2021.No further information was received by the Tribunal from the claimant and the respondent then lodged the application for strike out on 29 March 2021.

19. No further information has been received since then from the claimant in compliance with the order of 8 January 2021 or the previous orders.

20. The Tribunal adopted the two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores 15 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).

21. It is apparent is that the claimant has not complied with the Tribunal orders of 14 July 2020, 8 August 2020 and 8 January 2021 despite the considerable assitance that has been afforded him by the Tribunal during

the course of these Preliminary Hearings. On each ocassion he has been put on notice that failure to comply may lead to strike out of his claims under Rule 37(c). He has been on notice since 29 March 2021 that the respondent was seeking strike out for his failure to comply but to this date maintains that he has provided all the information required – when clearly he has not. The Tribunal was satisfied that stage one of the test (failure to comply with the Tribunal orders) was made out.

22. The Tribunal then went on to consider stage two of the test. In this regard the Tribunal was conscious of the fact that the claimant is a party litigant. Whilst bearing that in mind the Tribunal has to have regard to the overriding objective. In this case the claimant has been given almost a year to provide specification of his claims, he has been guided by the Tribunal on 14 July 2020, 8 August 2020 and 8 January 2021. He has been put on notice of the consequences of failure to provide the specification required by the orders and yet he has still not complied. The Tribunal cannot say whether his discrimination claims have any merit as they have not been sufficiently specified.

23. In the circumstances the Tribunal consider this is a clear case where it should exercise its discretion to strike out and to do so is in accordance with the overriding objective. The application for strike out is granted.

Employment Judge: Alan Strain
Date of Judgment: 05 August 2021
Entered in register: 10 August 2021
and copied to parties