EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. 4109600/2014

Held in Glasgow on 18 April 2017

Employment Judge: Ms R Sorrell

Mr R Brown	**Claimant** **In Person**
The Chief Constable **The Police Service of Scotland**	**1st Respondent** **Represented by:** **Mr R King** **Solicitor**
The Police Service of Scotland	**2nd Respondent** **Represented by:** **Mr R King** **Solicitor**

PRELIMINARY HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the Judgment of the Tribunal that the respondent's application to strike out the claimant`s complaint of having suffered detriment on the grounds of making protected disclosures is dismissed.

ORDER OF THE EMPLOYMENT TRIBUNAL

The following Orders have been made:-

1. Within 28 days of the date of this judgment, the claimant shall send to the respondent and to the Tribunal the following information in respect of each

alleged disclosure:

(i) the date of the disclosure;

(ii) to whom it was made;

(iii) the information disclosed;

(iv) reference to the document/transcript recording the disclosure and including an extract of the relevant passages from that document;

(v) the detriment (s) which the claimant says he was subjected to on the grounds of having made the disclosure;

(vi) the date(s) the detriment(s) occurred;

(vii) who took the detrimental action against the claimant;

(viii) an explanation of why the claimant believes the detrimental action is linked to making the disclosure.

In accordance with Rule 38 (1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, unless the Order is complied with by the date specified, the claim shall be dismissed without further order and the Tribunal shall give written notice to the parties confirming what has occurred.

2. Within 14 days of the date of receipt of the claimant's response to the Order, the respondent is ordered to reply to this response.

Introduction

1. On 19 October 2014 the claimant lodged a complaint of having suffered detriment on the grounds of making protected disclosures.

2. The claim was sisted between 2015 and 2016. Thereafter, it has been the subject of a number of Preliminary Hearings which are referred to where relevant in more detail below.

3. It was agreed at the outset of the hearing that representations would be heard from both parties in respect to this application.

4. Parties lodged separate productions at the commencement of proceedings.

Representations

Respondent

5. Mr King, for the respondent submitted that the application for strike out of the claim is made under Rules 37 (1) (b) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ('ET Regs 2013') on the ground that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious and 37 (1) (c) of the 'ET Regs 2013' on the ground of non-compliance with an order of the Tribunal.

6. Whilst it is accepted that the claim has been sisted, it is 2 ½ years ago that the claim was raised. There has been three recent orders for further and better particulars of the claim, but there is still no certainty of the claim and the sands continue to shift.

7. This application was reserved pending the claimant's response to these orders in the hope that it would cure any difficulties with the pleadings. At the previous Preliminary Hearings, the Employment Judges made it clear why the orders were being made and particularly in relation to the causal link between the protected disclosure and the detriment. Despite many

opportunities, the claimant has failed to set out his claim and provide the respondent with fair notice of it.

8. The claimant responded to the information required by EJ Doherty at a Preliminary Hearing on 9 January 2015 on 20 February 2015. The claimant detailed five disclosures, four of which took place between 12 January 2011 and 5 April 2011, the fifth taking place on 19 December 2012. (RD1) The claimant had complained to DCI Dewar about the unfairness of an investigation undertaken by DI Kerr and DS Pagan which he believed had resulted in him being reported to the Procurator Fiscal and having internal misconduct proceedings brought against him. During the course of DCI Dewar investigating his complaint, the claimant made four disclosures. The fifth disclosure made was that DCI Dewar had edited his complaint.

9. On 25 May 2016 the claimant provided a response to the respondent for further particulars of the protected disclosures. (RD2) The claimant relied upon the same disclosures detailed in RD1. On 19 September 2016 the claimant updated and replaced his response of 25 May 2016. (RD3) Although this contained the same five disclosures, a new section was added titled "Other disclosures," which the claimant stated did not contain new disclosures but were included for completeness in respect of the existing disclosures. On 9 January 2017 the claimant made new disclosures. The respondent is therefore concerned that the claim is still uncertain.

10. At a Preliminary Hearing on 20 July 2016 conducted by EJ Doherty, the claimant was required to provide additional information to link the protected disclosures to the detriment complained of. That was not complied with.

11. At a further Preliminary Hearing on 4 October 2016, EJ Wiseman ordered the claimant to set out specific information in respect of each alleged disclosure. At a subsequent Preliminary Hearing on 9 January 2017, the respondent considered this was still not adequately responded to and was ready to make a strike out application. However, at this hearing EJ d'Inverno

gave the claimant the opportunity to specify his case more clearly and drafted a table representing the claimant's case.

12. However, the disclosures detailed in the table depart significantly from the previous disclosures made on 20 February 2015 which the respondent had relied on with some certainty. Disclosures B, D and E in the document of 20 February 2015 are not mentioned at all in the table. The first disclosure in the table refers to DI Kerr and DS Pagan putting in a criminal case for corruption which is a completely new disclosure. Furthermore, the table now refers to a disclosure made to CC N Richardson which the claimant had previously said was made to SI Craig. The claimant has also made no attempt to link the detriments to each disclosure and the causal connection.

13. At the Preliminary Hearing on 9 January 2017 EJ D'Inverno also ordered the claimant to recast his application to amend his claim first tendered on 16 November 2016 in respect of the additional instances of disclosure he now sought to rely on. The claimant responded to this order on 23 January 2017 which he updated on 6 March 2017. (RD4) In this updated response, the claimant reverted back to the original five disclosures he relied on in February 2015, in spite of the disclosures that were tabled at the Preliminary Hearing of 9 January 2017. The detriment and causal connection stated were also different from those tabled on 9 January 2017. Only two out of the five disclosures tabled on 9 January 2017 had been previously stated and no causal links have been pled in spite of the order of 4 October 2016.

14. At a further Preliminary Hearing on 13 March 2017, EJ d'Inverno refused the claimant's application to amend the claim as there was a failure to offer proper notice of the case, especially in respect of causal connection. The claimant sought a reconsideration of this decision on 27 March 2017 (RD5), which EJ d'Inverno considered and upheld his decision of 13 March 2017.

15. Although the respondent appreciates this amendment application was rejected, this is not reasonable conduct as the claimant's position is changing materially and the need for clarity is paramount. The claimant

appears to not know the nature of the disclosures that he relies upon. Even though the claimant is no longer represented, he has acted unreasonably regarding his failure to comply with orders and by creating confusion around the disclosures and the basis of his case.

16. There are practical reasons why this affects these proceedings. A number of the officers named by the claimant have left or retired. Memories do not improve with time. Documents will become more difficult to recover. It is therefore unlikely that a fair trial can be achieved in this case.

17. In respect of authorities, **Weirs Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT** held that a Tribunal must look at the magnitude of the default caused by non-compliance of an order and the resulting disruption and prejudice in terms of whether a fair hearing is still possible. At least four of the witnesses' have now left and we do not know who else may be a witness. The claimant has conducted himself in an entirely disruptive and prejudicial manner by constantly shifting the sands as to what his case is about. **Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA** is also relied upon as the respondent considers that both of the conditions required are met and it is therefore proportionate to strike out the claim in these circumstances. Although there may be time for orderly preparation of the case as no merits hearing is set, the claimant will never be ready as the respondent does still not know the basis of the claimant's case.

18. In terms of the claimant's requests for further information (RD6-9), the respondent submits that these are irrelevant as they do not relate to issues the Tribunal is required to determine. The claimant is seeking for the Tribunal to resolve his grievance regarding matters he complained to Dewar about and to reopen the investigation undertaken in 2008 which is before the disclosures were made. These requests are persistent and disruptive. The claimant has made a difficult case more complicated and unmanageable because of the way he has conducted the case and the delay he has caused. In accordance with **Jones v Wallop Industries Ltd**

17182/81 the claimant has acted vexatiously due to the manner in which he repeatedly makes applications for recovery of documentation.

19. As the respondent understood the protected disclosures to be those tabled on 9 January 2017 it took the view there was no time bar point. This is now uncertain due to the claimant's submission that these disclosures do not now stand.

Claimant

20. The claimant submits that he is unrepresented and has no experience in employment law. He is confused about which disclosures he wishes to rely upon from RD1 and the Note of 9 January 2017 and accepts the issue of the causal connection is a mess. He thought he had to outline why his disclosures were protected and therefore he needed the relevant documents in order to do that.

21. The claimant accepts that he did not comply with providing the required information at the Preliminary Hearing of 20 July 2016, although there was no mention of the requirement to state a causal connection. Following the order made at the Preliminary Hearing of 4 October 2016, he parted ways with his solicitor and accepts he did not comply with the order in terms of the causal connection between each disclosure and the detriment as he did not understand it and didn't realise that he was required to substantiate these connections.

22. In terms of the table of disclosures drawn up by EJ d'Inverno on 9 January 2017 the claimant submits this was based on questions put to him, but that he may have misunderstood the grid and what was being asked of him. He cannot explain the difference between the disclosures in RD1 and those tabled on 9 January 2017. His understanding of the causal connections was incorrect.

23. He submits that he has complied with the orders made at the Preliminary Hearing on 9 January 2017.

24. In respect of the issue of witnesses' and the possibility of a fair trial being at risk, the claimant has the addresses' of the named officers and finds it hard to believe that the respondent cannot identify their whereabouts. He is also aware that witness orders have been issued to these officers in another employment Tribunal case which means that their contact details would be within the knowledge of the respondent. Furthermore, most of this case will be decided on the basis of the documentation and will not be reliant on the memory of witnesses'.

25. As regards the case of **Blockbuster Entertainment Ltd** ***("supra")*** and the matter of delay, the claimant submits that the respondent is equally culpable in this respect due to the police transcripts it has provided of his recorded statement of 2011. He has detailed material discrepancies in respect of these transcripts which still need to be addressed by the respondent. (CD8)

26. The claimant submits that the interests of justice must override this strike out application and he relies upon the authorities of **Qdos Consulting Ltd v Swanson UKEAT/0495/11/RN**, **Anyanwu v South Bank Student Union and CRE 2001 UKHL 14** and **Ezias v North Glamorgan NHS Trust (2007) EWCA Civ 330**.

27. In summing up, Mr King submitted that the respondent has nothing to explain to the Tribunal in terms of the police transcripts and for the claimant to say he did not understand the information he gave at the Preliminary Hearing on 9 January 2017 to EJ d'Inverno about the disclosures and detriments is utterly disingenuous. This is further evidence of the claimant's scandalous and unreasonable conduct in these proceedings.

28. In response, the claimant reiterated that he accepted there were failings on his part regarding further specification of his claim and that it was not surprising as a lay person that he was struggling to understand what was required of him, but that he was keen to rectify the confusion over the disclosures as soon as he could.

Relevant Law

Striking out a claim or response

29. Rule 37 (1) (b) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ('ET Regs 2013') provides that a Tribunal may strike out all or part of a claim or response if the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent has been scandalous, unreasonable or vexatious.

30. The authority of **Bennett v Southwark LBC 2002 ICR 881, CA** held that the word 'scandalous' is not to be given its colloquial meaning of 'shocking' and should be interpreted as meaning irrelevant and abusive of the other side. The case of **ET Marler Ltd v Robertson 1974 ICR 72, NIRC** described a 'vexatious' claim or defence as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive. It is also used for an abuse of process. **Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA** held that for a Tribunal to strike out a claim or part of for unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. In either case, the striking out must be a proportionate response.

31. Rule 37 (1) (c) of the 'ET Regs 2013 provides that a Tribunal may strike out all or part of a claim or response for non-compliance with any of these Rules or with an order of the Tribunal.

32. **White – v – University of Manchester 1976 ICR 419 EAT** provides that the general purpose of further particulars is to enable parties to adequately prepare for the hearing by being given sufficient notice of the case before them. This principle was developed in the case of **Byrne and others –v-Financial Times Ltd 1991 IRLR 417 EAT** which states that particulars are for the purpose of identifying the issues. Further, in **Nunez - v – Veritas**

Software Ltd EAT 0020/04, the EAT held that the individual bringing a claim must take the responsibility of formulating it in order for the respondent to be fully aware of the case against it.

33. **Weirs Valves and Controls (UK) Ltd –v- Armitage 2004 ICR 371, EAT** provides authority that in deciding whether to strike out a party's case for non-compliance with an Order, a Tribunal will have regard to the Overriding Objective set out in Rule 2 of the 'ET Regs 2013' of seeking to deal with cases justly. This requires consideration of a number of relevant factors, including the magnitude of the non-compliance, whether the default was the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible and whether striking out or some lesser remedy would be an appropriate response. It must also consider whether a striking out order is a proportionate response to the non-compliance; **Ridsdill and others –v- Smith and Nephew Medical and others EAT 0704/05.**

34. In determining whether to strike out a claim (or part of) on any grounds, a Tribunal must give consideration to whether a fair trial is still possible. In **De Keyser Ltd –v- Wilson 2001 IRLR 324 EAT** the EAT made it clear that in ordinary circumstances, neither a claim or a response can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible. This approach was endorsed in **Bolch –v- Chipman 2004 IRLR 140** in which the EAT held that a Tribunal must first find that a party has acted in such a manner and on making that finding, consider whether a fair trial is still possible. If a fair trial is still possible, the case should be permitted to proceed. Even if a fair trial is unachievable, the Tribunal will need to consider the appropriate remedy in the circumstances which may be a lesser penalty.

Issues to be Determined

35. Has the claimant complied with the Order of 4 October 2016?

36. If not, should the claim be struck out under Rule 37 (1) (c) of the 'ET Regs 2013?'

37. Has the manner in which the claimant conducted proceedings been scandalous, unreasonable or vexatious?

38. If so, should the claim be struck out under Rule 37 (1) (b) of the 'ET Regs 2013?

Conclusion

39. Having considered parties' submissions, the productions lodged, and the Notes from earlier Preliminary Hearings, I have taken the view that the respondent's application to strike out the claim on the grounds of non-compliance of an order and the scandalous, unreasonable or vexatious manner in which the proceedings have been conducted by the claimant should be dismissed. In reaching this decision I have taken account of a range of factors.

40. In terms of the non-compliance of an order, the claimant accepts that he did not comply with the order of 4 October 2016 made at a Preliminary Hearing by EJ Wiseman in respect of providing an explanation as to why he believes that the detrimental action is linked to each alleged disclosure. The claimant submitted that this was primarily due to him no longer having legal representation and struggling to understand what was required of him.

41. In applying the authorities of **Weirs Valves and Controls (UK) Ltd *("supra")*** and **De Keyser *("supra")*** I have taken the view that in spite of this default, it would be disproportionate to strike out the claim on this ground as a fair trial is still possible. This is because of the reasons the claimant has given for his non-compliance of the order and that he has largely provided the further information sought during the course of the earlier Preliminary Hearings. It is also not in dispute that he complied with

the orders made by EJ d'Inverno at the Preliminary Hearing held on 9 January 2017.

42. Furthermore, throughout this Preliminary Hearing, Mr King referred to the delay in proceedings caused by the claimant due to his failure to comply with orders which has led to a fair trial not being possible. However, although the claim was lodged on 19 October 2014, the respondent made an application to sist the claim at a Preliminary Hearing on 9 January 2015 on the basis that it was related to an ongoing investigation into allegations made by the claimant of criminal conduct on the part of a number of police officers. The claim was subsequently sisted until a further Preliminary Hearing was held on 20 July 2016. Whilst at this hearing EJ Doherty detailed the additional information sought from the claimant at this hearing, no specific reference was made to the need for the claimant to provide an explanation of why he believes that the detrimental action is linked to each alleged disclosure. Therefore the first occasion the claimant was ordered to provide that particular information was at the subsequent Preliminary Hearing conducted by EJ Wiseman held on 4 October 2016.

43. Moreover, there have been three further Preliminary Hearings since then and prior to this hearing. At the second of these three hearings held on 9 January 2017, EJ d'Inverno afforded the claimant the opportunity to detail each alleged disclosure he relied upon. These were set out in a table that formed part of the Note of that hearing. Although EJ d'Inverno continued this hearing to 13 March 2017, time constraints did not permit the respondent's application to strike out the claim to be heard until this hearing was scheduled.

44. For these reasons, I am therefore of the view that these proceedings are still at a relatively early stage and that no unfairness or prejudice (including the availability of witnesses' and reliability of evidence) has been caused to the respondent as a result of the claimant's non-compliance of the order and accordingly in terms of **De Keyser Ltd** ***("supra")***, that a fair hearing is still possible.

45. In terms of the application to strike out the claim on the ground that the claimant has conducted proceedings in a scandalous, vexatious and unreasonable manner, I am not persuaded that the claimant's conduct meets the high threshold required in accordance with **Blockbuster Entertainment Ltd** ***("supra")*** in that it involved a deliberate and persistent disregard of required procedural steps. This is because as discussed above, the claimant has largely provided the further information sought during the course of the earlier Preliminary Hearings and admits he has not provided the causal connections between the alleged disclosures and detrimental action ordered on 4 October 2016 as being a party litigant, he is struggling to understand what is required of him.

46. Nevertheless it is clear that the claimant's difficulty in articulating his claim is a fundamental issue which has since been compounded by the fact that the alleged disclosures specified by the claimant on 20 February 2015 differ from those tabled at the Preliminary Hearing on 9 Jan 2017, which were then further revised in both the application to amend the claim and again in the reconsideration of refusal to amend the claim.

47. Whilst this is understandably a cause of concern for the respondent, I consider that this is mainly due to the claimant representing himself since October 2016 in respect of a claim with a complex factual matrix in a technical area of employment law, rather than because he is harassing the respondent or being abusive towards them out of some improper motive as discussed in **Bennett** ***("supra")*** and **ET Marler Ltd** ***("supra")***.

48. As I am not persuaded that the claimant has acted in such a manner, in accordance with the steps set out in **Bolch** ***("supra")***, I am not required to go on to consider whether a fair trial is still possible in terms of **De Keyser Ltd** ***("supra")***.

49. However, notwithstanding this view, it is apparent that this claim requires clarity and greater certainty as to the alleged disclosures, the detrimental

action and the causal connection between them in order that the respondent has fair and due notice of the claim against them prior to proceeding to a Final Hearing. In adhering to the Overriding Objective of the 'ET Regs 2013' of dealing with cases fairly and justly to ensure that parties are on an equal footing, I have concluded that the remedy of an unless order is a more appropriate and proportionate response for non-compliance of an order, because in these circumstances the claimant should be afforded a final opportunity to articulate the basis of his claim. In this regard as a party litigant, the claimant is encouraged to consider seeking legal advice prior to complying with this Order and is afforded adequate time to do so. Equally, the respondent will have an opportunity to reply to the claimant's response to the Order.

50. In light of the pressing need for the claimant to articulate his claim, the relevance of his requests to the respondent for additional information at RD6-9 and the alleged vexatious nature of them can be considered at a further Preliminary Hearing if still insisted upon once the claimant has responded to the Order clarifying the basis of his claim and after the respondent has replied to his response.

51. For all these reasons the respondent's application for strike out of the claim is dismissed.

52. A Preliminary Hearing to consider case management issues should be listed once the Orders have been complied with.

Employment Judge: Ms R Sorrell
Date of Judgment: 15 June 2017
Entered in register: 15 June 2017
and copied to parties