



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Respondent

Mr J Howie
Ms K Hunter
Ms L Whittle

AND

Sunderland City Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 31 October 2017

Before: Employment Judge Hargrove

Appearances

For the Claimants: Mr N Guss, Solicitor
For the Respondent: Mr D Thompson, Solicitor

JUDGMENT

The judgment of the Employment Tribunal is that the above claims be struck out as not actively pursued under rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

1 This is an application by the respondent to strike out the above claims under rule 37 which materially provides as follows:-

“(1) At any state of the proceedings either on its own initiative or on the application of a party, a tribunal may strike all or part of a claim ... 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 ... has been scandalous, unreasonable or vexatious;
- (c) ...
- (d) that it has not been actively pursued”.

The application was first formally notified to the Employment Tribunal in a position paper dated 17 July 2017. I listed it for hearing on 10 August 2017 to take place on 31 October 2017. The claimants’ initial response to it in the form of a reply to the position paper was received on 25 August 2017. I have also considered the respondent’s addendum and two schedules attached dated 12 September; and the claimants’ further response to it dated 23 October 2017.

- 2 The history of these claims may materially be summarised as follows. Up until November 2012 Stefan Cross Solicitors presented a large number of claims to the Employment Tribunal, including the three claims in question in this application. The earliest such claim was that of Ms Whittle presented on 19 June 2006. The proceedings involved many thousands of claims which were the subject of a lengthy Tribunal hearing under the lead name of Brennan which began in 2009 and ended in early 2012. This was followed by an agreement to settle the proceedings; and on 26 October 2012 Employment Judge Rennie ordered that all proceedings in the Brennan multiple should be stayed pending settlement. A further order was made on 19 November 2012 staying all proceedings pending settlement in the Abendshine sub multiple. The latter claims concern only union claimants represented by Thompsons Solicitors.
- 3 On the same, 19 November 2012, SCS sent a schedule to the respondent which I have inter alia identified comparators for their outstanding claims and attached details identifying which claims were being pursued actively and were to be the further subject of settlement negotiations and also including details in respect of the three above claims. These details are summarised in a schedule attached to the respondent’s first position paper dated 17 July 2017. In that schedule Mr Howey’s claim number was identified as being 2505833/2012, presented on 8 October 2012, Ms K Hunter’s claim number 2505786/2012 also presented on 8 October 2012 and finally Ms L Whittle’s claim number 2511511/2006 presented on 19 June 2006. Although the schedule stated the claims were ongoing the comparator post relied upon column stated in the case of each of the claimants “comparator post yet to be agreed and/or Stefan Cross Solicitors taking instructions”. Under the next column the identification of the comparator in the case of all three claimants it was stated “Not proceeding”. Finally under the notes column the claim of Mr Howey was noted as “Cancellation”; that of Ms Whittle stated “Earning higher than comparator” and that of Ms Hunter stated “Claimant does not want to continue her claim”. No further action was taken in respect of those claims thereafter until much later, after Thompsons had taken

over presentation of these claimants following Stefan Cross Solicitors' complete withdrawal from representation sometime in 2013, late in 2016.

The next stage in the story is that two of the claimants, Mr Howey and Ms Hunter, presented further claims to the Tribunal when represented by Thompsons. Mr Howey's claim number 2501098/2013 was presented on 26 February of that year, Ms Hunter's claim number 2506208/2012 was presented on 7 November 2012. The claimant Ms Whittle did not present a further claim via Thompsons but, under the terms of a memorandum of understanding in 2015 she started a non Tribunal claim by submitting a grievance to the respondent in May 2015. The memorandum of understanding between Thompsons and the respondent resulted in settlements of the Thompsons claims which resulted in the Employment Tribunal claims made by Mr Howey and Ms Hunter being dismissed on 1 September 2014. The settlement period covered by the settlement stated in the case of Mr Howey from 25 February 2007, six years back from the date of the presentation of the Thompsons claim. In the case of the claimant Ms Hunter it dated back _____ the full six year period but only to 15 April 2007. The settlement period for the claimant Ms Whittle dated back six years from the date upon which she submitted her grievance namely 23 January 2014. Although it was not recognised at the time of these settlements there was in the case of these claimants what has been called a settlement gap dating back from the start of the settlement period described above because it did not cover the arrears period dating from the presentation of the Stefan Cross claims. The settlement gap in the case of Mr Howey was between 8 October 2006 and 25 February 2007; in the case of Ms Hunter from 8 October 2006 to 15 April 2007 and more significantly in respect of the claimant Ms Whittle the gap between 19 July 2000 (six years prior to the presentation of the Stefan Cross claim) and 22 January 2008, a period of some seven and a half years. The gap appears to have been first identified by the respondent on or about 7 March 2016 and enquiries were made of the Tribunal at that time. Mr Thompson enquired of the Tribunal whether or not the Stefan Cross claims in respect of these three claimants were all live and whether they were recorded as being represented. The Tribunal responded on 8 March notifying that they were all live and that they were recorded as being represented by Thompsons. On 11 March 2016 Mr Thompson wrote to Thompsons (Mr Gourley) enquiring whether he was representing two of the three claimants. This does not appear to have alerted Thompsons to the existence of a settlement gap, at least at that stage. The settlement gap was however specifically identified in respect of these claimants and others in November 2016.

- 4 On behalf of the respondent it is submitted that the SCS claims were effectively abandoned, although not formally withdrawn with the Tribunal, since the communication was not made to the Tribunal by SCS, on 19 November 2012. No action was taken until Thompsons sought to raise issues about the settlement gap in late 2016, the claims had not been actively pursued before that and accordingly should be struck out. On behalf of the claimants it is submitted that no steps were taken by the respondent to strike out claims by the respondent in 2012 as not actively pursued; that they were never formally withdrawn and were in particular not withdrawn at the time of the 2014 settlements; that the issues were never raised during that settlement process, that there was a settlement

gap, and that the respondent had not been consistent in their position with regard to a settlement gap until July 2017 in that they first enquired of the Tribunal in 2016 whether or not the SCS claims had been treated as withdrawn in 2012. The claimants had actively pursued the claims once it had been identified to them that there was a settlement gap.

- 5 I have been referred by both parties to the existence of a two part test to strike out applications under rule 37. The first part is to determine whether one of the grounds for strike out in the rules 37(1)(a) to (e) has been established on the facts. The second part is that if any of the grounds have been established, whether it is just to proceed to a strike out in all the circumstances including whether other lesser measures might suffice. Mr Guss cited a passage from the judgment in **Hasan v Tesco Stores Limited UKEAT/0098/2016:-**

“17 ... The way in which rule 37 is framed is permissive. It allows an employment judge to strike out a claim where one of the five grounds are established but it does not require him or her to do so. That is why in the case of **Dolby** the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two stage approach ...

19 The second stage exercise of discretion in rule 37(1) it important, not just where the striking out ground established is minor or excusable; it is a fundamental cross-check to avoid the bringing to an end prematurely of a claim that may yet have merit”.

- 6 Having considered the submissions I am satisfied that these claims have not been actively pursued by or on their behalf since November 2012 notwithstanding that in Ms Whittle’s case her claim had been presented as long ago as 2006. It is not just a case of them having not been pursued since November 2012 because at that time they were all effectively abandoned albeit for different reasons by their first solicitors. Thompsons must have taken over responsibility for these claims from late 2012 into 2013 because two further Employment Tribunal claims were presented for Mr Howey and Ms Hunter. All three claims were the subject of settlement negotiations under the first MOU. It was open to Thompsons to identify an earlier period of claim, but they appear to have ignored or probably not investigated the possibility of an earlier period of claim under the claimants’ then existing proceedings. It is in my view appropriate to conclude that in the circumstances where there was both an effective abandonment of these early claims by Stefan Cross Solicitors followed by a period of four years of inaction, that this is a clear case of claims not actively pursued. In exercising a discretion at the second stage it is relevant in my view to take into account what was being said about the strengths or more properly the weaknesses of the case by Stefan Cross in November 2012. In Mr Howey’s case the comment was “Cancellation”; in Ms Whittle’s case the comment was “Earning higher than comparator” and in Ms Hunter’s case “Claimant does not want to continue her claim”. In those circumstances it seems to me that a litigation decision had been taken. It may be of course that there was some other comparator who might have been available or in respect of which there might have been some pay inequality but no evidence has been placed before me to

indicate that there was something of value which could even now have been pursued as part of settlement negotiations. If in the case of Ms Hunter she was indicating as it appears she was that she did not want to continue with her claim the point is made that she must at a later stage have changed her view because she did pursue a subsequent claim by way of a grievance through Thompsons, but that does not mean that she did not express the view in 2012 that she did not wish to pursue her 2006 claim. In all of these circumstances it is appropriate to strike out these claims.

EMPLOYMENT JUDGE HARGROVE

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

9 November 2017

JUDGMENT SENT TO THE PARTIES ON

9 November 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL