EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Itulu**

Respondent: **London Fire Commissioner**

JUDGMENT

The claim is struck out.

REASONS

1. At a hearing on 15/1/2021 the respondent made an application that the claim be struck out because it has no reasonable prospect of success.

2. The claimant claimed she had not had notice of the respondent's application; she had. She was put on notice of the respondent's application dated 19/8/2020 (page 512). Nevertheless, the claimant was granted until 22/1/2021 to respond in writing to the application. The respondent had until 29/1/2021 to provide a short reply. All written representations were considered.

3. The claimant had presented claim number 2300730/2015 on 1/2/2015. That claim was determined, along with two others at a multi-day hearing in September and October 2020. Judgment was dated 5/11/2020. One of the issues to be determined in claim number 2300730/2015 was an equal pay claim under chapter 3 of the Equality Act 2010 (EQA).

4. The claims determined were the seventh, eighth and ninth claims in a series presented by the claimant. There had been (it is understood) eleven case management hearings in respect of those claims.

5. As a preliminary matter at the September/October 2020 final hearing, the claimant made an application for this claim to be consolidated with those claims. That application was refused as the respondent had not yet presented its ET3 (or at least the ET3 was not served upon the claimant until 23/9/2020 during the course of the hearing).

6. The facts in respect of the equal pay claim were set out in three short paragraphs:

> The last issue in the first claim is an equal pay claim; the claimant compares herself to Mr Ajibola in that she was employed on like work or on broadly similar terms. The claimant was grade FRS C in the Fire Safety Policy Group. Mr Ajibola's substantive grade was B, however he was acting up into a FRS D role. He was the claimant's line manager.
>
> It was the claimant's own case that when she was moved into the Fire Safety Policy Group as a supernumerary FRS C, that she had no managerial responsibilities. At paragraph 46 of her witness statement, she says:
>
>> 'The Respondent admitted that the FRS C role that the Claimant formerly held in the South East Area Support Team had management responsibilities. The Respondent admitted that the grade FRS C role in the CS team does not have managerial responsibility. This clearly contradicts the Respondent's contention that the Claimant had suffered no detriment and undermines its case.'
>
> Furthermore, the claimant was paid more than Mr Ajibola. The claimant was paid at the top of band FRS C on £33,394. Mr Ajibola was placed on the bottom of the pay scale for FRS D and was on £33,062.

7. The Tribunal's conclusion in respect of the claim was:

> The equal pay claim was ill-judged, flawed and inappropriate. The claimant was paid more than her male comparator and once that element was established, the claim should have ended there.

8. This claim was presented on 17/6/2020 and it was a claim of victimisation contrary to s.27 EQA. The claimant accepted the employment relationship had ended in December 2018[1] and she relied upon s. 108 EQA – relationships that have ended.

9. At a preliminary hearing on 13/2/2020 (which the claimant did not attend) both parties were subject to unless orders. The unless order which applied to the respondent was set out (page 28):

> *Clarification of Respondent's Position in Relation to Equal Pay Claim*

UNLESS ORDER
Employment Tribunals Rules of Procedure 2013
Rule 38

[1] The exact date of termination is in dispute and the claimant claims unfair dismissal in claim 2304574/2018.

On the Tribunal's own initiative and having considered any representations made by the Respondent, the Claimant not being present, it is ORDERED that –

Unless by 2 March 2020 the Respondent

1. *confirms to the Tribunal in writing, with a copy to the Claimant at the same time, its position in relation to*

a. *the difference in pay between the Claimant and her identified comparator – as referenced in para 25 of the Respondent's List of Issues dated 12 February 2020, from 6 November 2014 to the date of the presentation of the claim on 1 February 2015;*

b. *whether it agrees that the Claimant was employed on 'like work' with the comparator; and if not, why not; and*

c. *the genuine material factor defence relied upon – as referenced in para 26 of the Respondent's List of Issues dated 12 February 2020.*

ORDER
The part of the response dealing with the Equal Pay complaint will stand dismissed without further order.

The Respondent will then be entitled to notice of any hearings and decisions of the Tribunal but will only be entitled to participate in any hearing relating to that part of the response to the extent permitted by the Employment Judge.

The Judge's reasons for making this Order are set out below.

10. The respondent wrote to the claimant on 28/2/2020 (page 479):

Dear Ms Itulu

Further to my email dated 26 February 2020, please find attached copies of the following documents;

- *Letter to Mr Afolabi dated 9 May 2014 confirming his temporary promotion to the grade of FRS D,*
- *Mr Afolabi's payslips dated 26 November and 22 December 2014 and 28 January 2015*
- *Your payslips dated 26 November and 22 December 2014 and 28 January 2015*
- *Pay scale for FRS grade 2014.*

As you will see from the attached payslips, Mr Afolabi's salary was lower than the salary you received during the relevant period. This was because you are at the top of the pay scale for your grade

(FRS C), whereas Mr Afolabi was placed at the bottom of the pay scale for the FRS D grade. I attach the pay scale for the FRS grades in 2014 you will note that there is a small overlap between the top of the FRS C grade and the bottom of the FRS D grade.

Given that your salary was higher than Mr Afolabi's during the relevant period, there does not appear to be any basis for your equal pay claim, and I would therefore invite you to withdraw this aspect of your claim.

If this aspect of your claim is not withdrawn, I will be making an application for a deposit order to be made in respect of the claim at the preliminary hearing on 3 April 2020.

I will be forwarding the attached information to the Tribunal on Monday 2 March 2020.

11. On 1/3/2020 the claimant wrote to the Tribunal and made an application to add a complaint of victimisation as a result of the respondent's email of 28/2/2020 (page 492). That application was refused on 27/3/2020 (page 495).

12. The respondent subsequently wrote to the Tribunal on 2/3/2020 in accordance with the unless order (page 493):

Dear Sirs

I act for the Respondent in relation to the above claim.

Pursuant to paragraph 6 of EJ Hyde's order dated 19 February, I attach copies of the following documents

- *pay slips dated 26 November and 22 December 2014 and 28 January 2015 for the Claimant and the comparator that she relies on in respect of her equal pay claim, Mr Ajibola Afolabi.*
- *letter to Mr Afolabi (comparator) that sets out the arrangements for his temporary promotion, including salary*
- *pay scales for FRS grades in 2014.*

It should be noted from the attached pay slips that the Claimant's salary was in fact higher than that of Mr Afolabi during the relevant period.

Given the attached, I wrote to the Claimant on 28 February 2020 inviting her to withdraw the equal pay claim. I also informed the Claimant that if this aspect of her claim is not withdrawn, it will be one of the claims in respect of which the Respondent will be asking the Tribunal to make a deposit order at the forthcoming PH on 3 April 2020.

I understand that the Claimant has by email dated 1 March 2020 written to the Tribunal about my inviting her to withdraw her equal pay claim. The Claimant's allegation that I have intimidated her or subjected her to victimisation is denied. I have merely pointed out to the Claimant that based on the attached salary information, her equal pay claim is misconceived.

I would be grateful if you could ensure that this email and the attached payslips are forwarded EJ Hyde as soon as possible.

13. The respondent submits there is little factual dispute as the content of the emails speak for themselves. The respondent says the claim has no reasonable prospects of success. It relies upon:

    1 Judicial proceedings immunity;

    2 the lack of a necessary link required by s108(1) and (2) EQA; or

    3 even if not covered by absolute immunity the email plainly amounted to a reasonable and honest communication and the claimant has no reasonable prospects of establishing it amounted to a detriment.

14. The claimant's response to the application runs to nine-pages. The claimant stated:

    In this written representation, the claimant is only addressing issues that links the respondent's strike out application in the grounds of resistance, but not in relation to other issues set out in the ET3 as a whole, because the claimant contend that those matters should be determined at the full merit hearing.

15. It is not clear what the claimant means by this statement as the respondent's application is to strike out the claim in its entirety, not part of the claim.

16. The claimant contends that the doctrine of judicial proceedings immunity does not apply and states that there is are disputed facts which require determination at a final hearing.

17. Both parties relied upon and set out the relevant authorities in their written submissions. The respondent set out the relevant principals for a Tribunal considering strike out and/or deposit per Arthur v. Hertfordshire Partnership University NHS Foundation Trust UKEAT/0121/19. In particular:

    1 The test for strike out is a 2 stage test. The Tribunal should consider whether they are satisfied that the grounds for strike out are made out on the facts and then go on to consider whether it is just to proceed to strike out in all the circumstances.

    2 Where it is said that the claim has no reasonable prospect of success, the ET must be satisfied that the claim or allegation has

no such prospect, not just that success is thought unlikely.

3 *The ET should take the Claimant's case at its highest. If there remain disputed facts there should not be strike out unless the allegations can be conclusively disproved as demonstrably untrue.*

4 *An application for a deposit order has a lower threshold. In a deposit application the Tribunal has a broad discretion and is not restricted to considering purely legal questions. In particular the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case. The Tribunal is entitled to reach a provisional view as to the credibility of the assertions being put forward.*

18. The claimant in her submissions insists the respondent has not made an application for a deposit in the alternative, that however is clearly incorrect.

19. The EAT in Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, said that, in suitable cases, applications for strike-out may save time, expense and anxiety. In cases that are likely to be heavily fact-sensitive (such as those involving discrimination or public interest disclosures) the circumstances in which a claim will be struck out are likely to be rare. This echoes the House of Lords' judgment in Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL.

20. Taking those authorities as a starting point, this is not a claim which is heavily fact sensitive. The history is quite straight-forward. The claimant brought, amongst other claims, an equal pay/equality of terms claim under chapter 3 EQA. The respondent defended the claim. The respondent was subject to an unless order, which if it did not comply with that order, risked having its response to the equal pay claim dismissed without further order. The respondent supplied the information to the claimant it was directed to provide. Having analysed that information the respondent pointed out that the claimant's male comparator earned less than she did. To advance an equal pay claim, a claimant needs to identify a named comparator of the opposite sex. Unlike a s.13 EQA direct discrimination claim, which is also a comparative exercise, it is not possible to rely upon a hypothetical comparator for a claim under chapter 3.

21. The claimant identified her comparator and as per the Tribunal's order, the respondent provided the pay information. It may have been the case that the claimant assumed her comparator was paid more than her and if that had been the case, it would have been up to the claimant to then establish equal work as per s. 65 EQA.

22. The claimant's case was however thwarted as it transpired her male comparator was paid less than she was and the respondent evidenced this. It was open therefore for the respondent to point this out to the claimant and to invite her to withdraw this aspect of her claim.

23. Ms McEntee did not threaten the claimant in any sense. She merely pointed out, quite rightly, that the equal pay claim was misconceived and invited the claimant to withdraw it. She went onto say if the claimant did

not withdraw the equal pay claim, that she would invite the Tribunal, at the forthcoming preliminary hearing, to order a deposit to be paid as a condition of continuing with that aspect of the claim. Ms McEntee did not refer to making a strike out application or take any position in respect of costs.

24. It is difficult to see how Ms McEntee could have been any more reasonable when acting for her client who was defending a totally misconceived claim. Ms McEntee did not even use the word 'misconceived' in the email of 28/2/2020 which the claimant says is an act of victimisation, contrary to s. 27 EQA. Complying with an order of the Tribunal therefore engages judicial proceedings immunity. The respondent should not be at risk of claims of victimisation for merely complying with an order.

25. Ms McEntee's conduct, despite the claimant's submission, did not engage anything like the conduct in Derbyshire v. St Helens Metropolitan Council [2007] ICR 841.

26. After the claimant had made her allegation of victimisation, Ms McEntee did then refer to the claimant being misconceived, she did not however do so in the email which so offended the claimant.

27. Although the claimant is a litigant in person, she is an experienced veteran of, thus far, fifteen claims and several appeals to the EAT. She has made many serious allegations of various forms of discrimination against the respondent and named individuals which have been aired in public hearings. None of her claims which have proceeded to date to a final hearing have been successful. It being suggested to the claimant that she should withdraw one hopeless claim, of 25 remaining allegations (in addition to the allegations in the two additional claims which had been consolidated) was not a detriment.

28. Furthermore, it was not a detriment to which the claimant had been subjected because she had done a protected act. The protected acts were the bringing proceedings under the EQA. The reason for Ms McEntee's email was nothing whatsoever to do with the fact the claimant had brought previous proceedings. Ms McEntee's email was motivated by pure common sense and a desire, on one small and discrete point, to limit the issues which the Tribunal had to determine or to prevent unnecessary case management applications in respect of that issue.

29. The email was not oppressive, offensive or intimidatory, in fact it was the opposite. Furthermore, there was no nexus between the claimant's employment or its termination and the email so as to engage s. 108 ERA. The circumstances of the email did not arise out of the claimant's employment. They arose as a result of the Tribunal ordering the respondent to provide information to the claimant, as a result of her pleaded equal pay claim.

30. Even if judicial proceedings immunity did not apply, this is not an act of victimisation by the respondent. The respondent's sensible suggestion to the claimant that she withdrew her claim was not a detriment and it was

completely unconnected with any previous protected acts by the claimant. The respondent was complying with the Tribunal's order and was serving its duty under the overriding objective to ensure the parties were: on an equal footing (the claimant is not obliged to agree with the respondent, but it informed her one small part of her claim was bound to fail, in moderate terms and gave her the reasons why, which were subsequently reflected in the Tribunal Judgment following the final hearing); proportionality (not to incur time unnecessarily in making applications in respect of this claim or alternatively, having to address evidence in respect of it and to incur time at the hearing and in deliberations); and; saving expense (for the aforementioned reasons).

31. In those circumstances, the Tribunal is satisfied there are grounds for striking out the claimant's claim are made out on the facts. Putting the claimant's claim at its highest, the Tribunal is similarly satisfied it has no reasonable prospects of success, not that it is just unlikely to be successful.

32. Is it then just to strike out the claim in the circumstances? The Tribunal finds that it is just to strike the claim out. This claim is as misconceived as the original equal pay claim which forms the basis of this victimisation claim. The claim is bound to fail and it is not proportionate to use any more of Tribunal time in relation to it.

33. The claim is therefore struck out as judicial proceeding immunity applies and in the alternative, the claim of victimisation has no prospects whatsoever of success.

Employment Judge Wright

3/2/2021