EMPLOYMENT TRIBUNALS (SCOTLAND)

Judgment of the Employment Tribunal in Case No: 4113582/2021 Issued Following Open Preliminary Hearing Held at Edinburgh on the Cloud Based Video Platform on 6th September 2022

Employment Judge J G d'Inverno

Mrs M Hutton	**Claimant** **Represented by:** **Ms N Gibb, friend**
Lothian Health Board	**Respondent** **Represented by:** **Mr I Halliday, Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

(First) That the respondent's Application for Strike Out of the claim in terms of Rule of Procedure 37(1)(a) (No Reasonable Prospect of Success) is refused.

(Second) That the respondent's Application for Strike Out of the claim in terms of Rule 37(1)(e) (No Longer Possible to Have a Fair Hearing) is refused.

(Third) Upon being satisfied that the claim as currently pled enjoys little reasonable prospect of success, makes a Deposit Order in terms of Rule 39 and Orders the claimant to pay a deposit of £1000, by 4 pm on the 30th of September 2022, as a condition precedent of continuing to advance her complaint and provides that if the claimant fails to pay the deposit by 4 pm on the 30th September 2022 her claim to which the Deposit Order relates shall be and is hereby Struck Out in terms of Rule 39(4).

REASONS

1. This case called for Open Preliminary Hearing on the Cloud Based Video Platform at Edinburgh on 6th September 2022. The claimant was represented by Ms N Gibb, a friend; the respondent Health Board by Mr Halliday, Advocate.

2. The Open Preliminary Hearing ("PH(O)") was fixed to determine the respondent's Application to strike out the claims, variously in terms of Rule 37(1)(a) (that it enjoyed no reasonable prospect of success) and Rule 37(1)(e) (that the Tribunal considers that it is no longer possible to have a fair Hearing in respect of the claim); which failing, and in the alternative, for the making of a Deposit Order in the sum of £1,000, in terms of Rule 39, on the alternative grounds that the claim enjoyed little reasonable prospect of success.

3. The claim given notice of by the claimant in her initiating Application ET1 and with which the Applications are concerned, is a claim for compensation for breach of the sex equality clause in terms of section 66 of the Equality Act 2010, the claimant alleging that she was carrying out work equal to her male comparator, Mr Stuart Mitchell, and that she is paid less because of her sex. It is a complaint of direct discrimination.

4. There was before the court a joint bundle of documents, to some of which parties' representatives made reference in the course of submission and which included a copy of the Tribunal's Judgment of 3rd February 2015 in a

similar, but in the claimant's representative's submission distinguishable case, of **Mrs E Beattie v Lothian Health Board** (Case No: S/4106305/2013).

5. In accordance with an earlier direction of the Tribunal, the claimant at that time being an unrepresented party, the respondent's representative had furnished the claimant (and her instructed representative) with an advance note of arguments to be made by the respondent in support of the Applications.

6. It was a matter of concession on the part of the claimant confirmed in the course of the Open Preliminary Hearing by reference to her pleadings at page 52 of the joint bundle, that the claimant does not offer to prove that the Job Evaluation Scheme was of itself discriminatory.

Submissions for the Respondent

7. Counsel for the respondent submitted, in terms of the note of argument lodged by him and furnished to the claimant's representative in advance of the Hearing. His submissions were in the following terms:-

"**Note of Argument for the Respondent**

Introduction

1. The Claimant seeks compensation for breach of the sex equality clause in section 66 of the Equality Act 2010. She alleges that she is carrying out work equal to her male comparator, Stuart Mitchell, and that she is paid less because of her sex (direct discrimination).

2. The Respondent seeks strike out of the Claimant's claim on the ground that it has no reasonable prospect of success, and it is no longer possible to have a fair hearing (per r.37(1)(a) and (e) of the Employment Tribunal Rules of Procedure 2013). If strike out is not ordered, a deposit order of £1,000 is

sought as the claim has little reasonable prospect of success (per r.39(1)) of the Employment Tribunals Rules of Procedure 2013).

Issues

3. The Claimant must establish that the Claimant's work is equal to Mr Mitchell's work (sections 64(1) and 65(1) Equality Act 2010).

4. The Respondent accepts that the Claimant was paid less, and thus treated less favourably, than Mr Mitchell (section 66(2)(a) Equality Act 2010). Thus, if the Claimant establishes that her work is equal to Mr Mitchell's work, the burden shifts to the Respondent to establish (per section 69(1) Equality Act 2010) that:

   (i) The difference in pay is due to a material factor (namely, application of the Agenda for Change job evaluation process).
   (ii) That reliance on that factor is not directly discriminatory.

5. If the Respondent establishes that the difference is due to application of the Agenda for Change, it would be for the Claimant to show that that, as a result of the application of the Agenda for Change, women as a group doing work equal to hers are disadvantaged compared to men doing equal work (section 69(2) Equality Act 2010). The Claimant does not seek to demonstrate this. She does not challenge the validity of the Agenda for Change job evaluation scheme (Claimant's Response to ET3, Joint Bundle p.52). As such, the final stage of requiring the Respondent to establish that the Agenda for Change was a proportionate means of achieving a legitimate aim does not arise.

Strike out power – legal principles

6. The time and resources of employment tribunals ought not to be taken up hearing evidence in cases that are bound to fail. If the Claimant's case is

conclusively disproved by, or is totally and inexplicably inconsistent with, undisputed contemporaneous documents, it may be struck out. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts (Cox v Adecco [2021] I.C.R. 1307 at [22]).

7. The Claimant's case should ordinarily be taken at its highest. This requires the Tribunal to do more than simply ask the Claimant to be taken to the relevant material. The Tribunal must also consider the pleadings and any other core documents that explain the case. (Cox v Adecco [2021] I.C.R. 1307 at [26]).

8. Where there has been inordinate and inexcusable delay which prevents a fair trial, a claim should be struck out. The Tribunal must look for something more than the "routine" prejudice which would occur to each party if the case were to either proceed or be struck out, such as memories fading or documents and witnesses going missing (Elliott v Joseph Whitworth Centre Ltd (unreported), UKEAT/0030/13/MC at [9] & [16]).

No reasonable prospect of success

9. The Respondent does not accept that the Claimant's work is equal to Mr Mitchell's work. However, taking her claim at its highest, it can be assumed for the purposes of this strike out application that she will succeed in establishing this following a full hearing.

10. Even if this is established, the claim cannot succeed as the difference in pay is due to a material factor: the roles carried out by the Claimant and her comparator being evaluated differently under the Agenda for Change assimilation process. This different evaluation was primarily due to Mr Mitchell's possession of a SVQ3 qualification, whereas the Claimant only possessed a SVQ2 qualification. Both were assimilated to the role of Clinical Support Worker; however, Mr Mitchell was at Level 2 (Higher Level) whilst the Claimant was at Level 1. This role subsequently became known as Perioperative Support Worker.

11. The Claimant's suggestion that she undertook the SVQ3 training at the same time as Mr Mitchell is totally and inexplicably inconsistent with her answer to questions at the Grievance Meeting on 22 June 2022 (Grievance Meeting Notes, Joint Bundle p.113).

12. Difference in sex is not a factor taken into account as part of the Agenda for Change process which evaluates jobs based on objective factors such as: knowledge, training and education (including level of qualification held); patient care; freedom to act; and physical effort. The purpose of Agenda for Change was to implement a pay structure which was gender neutral in its application and which ensured equal pay across the NHS. As such, the Agenda for Change is not directly discriminatory.

13. The Tribunal previously considered the role of Clinical Support Worker under the Agenda for Change process in its determination in Beattie v Lothian Health Board issued on 3 February 2015 (Joint Bundle, pp.120-143). The review process which led to different bandings for the Level 1 and Level 2 Clinical Support Worker roles is considered at [17] to [19] and [24] to [25]. The key differences between these two roles, including the SVQ level required, is considered at [44] to [46]. The fairness of the Agenda for Change process is considered at [55]. The Claimant's suggestion that the Agenda for Change process was discriminatory is inconsistent with the Tribunal's findings. The time and resources of the Tribunal should not be taken up hearing this evidence again.

14. There is no reasonable prospect of the Claimant successfully demonstrating that the difference between her pay and Mr Mitchell's pay is due to her sex, as opposed to being due to application of the Agenda for Change which evaluated her job differently due to her lower level of qualification.

No longer possible to have a fair hearing

15. Due to the passage of time, the Respondent is unable to confirm why Mr Mitchell was assimilated to the Clinical Support Worker 2 (Higher Level) through the Agenda for Change process. This process took place between 2008 and 2009.

16. The Claimant sought review of her assimilation to the role of Clinical Support Worker 1. The result of this review, sent to the Claimant on 4 September 2008, was that no change to the pay band was justified. The Claimant signed a Band 2 Perioperative Support Worker Knowledge and Skills post outline on 4 May 2009. Mr Mitchell was awarded band 3 grading on 11 October 2010. According to her own chronology (Grounds of Claim, Joint Bundle p.17), the Claimant did not request a review of her responsibilities until 13 October 2017 – 7 years later.

17. This delay is both inordinate and inexcusable. It prevents a fair trial. The Respondent is unable to defend the claim due to fading memories and destruction of key documents, such as the documentation relating to Mr Mitchell's job evaluation under the Agenda for Change process. The Tribunal can deny the Claimant the opportunity to have her case heard by striking it out or force the Respondent to attend an unfair hearing. Striking out the claim is the lesser of the two evils.

Deposit order

18. As highlighted in Cox v Adecco [2021] I.C.R. 1307 at [34], in cases where strike out is not proportionate, an application for a deposit order may be appropriate. If the Tribunal does not accept that the claim has no reasonable prospect of success, it is submitted that the lower threshold of little reasonable prospect of success has been met. A deposit order should therefore be awarded at the maximum level of £1,000.

Conclusion

19. In light of the above, the claim should be struck out, failing which, a deposit order should be made."

Submissions for the Claimant

8. The claimant's representative commenced by reiterating the earlier made concession that the claimant did not challenge the Agenda for Change but rather, would seek to argue on the evidence at a Hearing that what had occurred had been an incorrect application of the assimilation process of the comparator to the Band 3 role, because he had not possessed the SVQ3 qualification at the point of assimilation. Under reference to page 110 in the bundle (grievance meeting note of 22nd June 2022), she submitted that the comparator had only taken the SVQ3 qualification in 2010 whereas assimilation had occurred in 2008. It would be the claimant's position in evidence that she took the SVQ3 qualification at the same time as the comparator which in turn put into dispute the respondent's assertion that the reason for the differential treatment of the claimant and the comparator was, amongst other claims the possession of the SVQ3 qualification.

9. She separately asserted that the claimant's position at Hearing would be that the comparator had been assimilated to the role and post and thus effectively promoted, without competitive selection, whereas that was an option not afforded to the claimant who had been thereby placed at a disadvantage.

10. Regarding the unreported decision of the Employment Tribunal in Case No: S/4106305/2013 of 3rd February 2015 **Beattie v Lothian Health Board** upon which the respondent's representative relied, the claimant's representative invited the Tribunal to distinguish **Beattie** on its facts. In the case of **Beattie** (see paragraph 12 page 124 of the bundle) the pre Agenda for Change position (pre assimilation position) was that the claimant in that case and her male comparator were carrying out different roles, the latter involving the discharge of a higher level of responsibility. In the instant case, on the other hand, both the claimant and her comparator were carrying out the same role prior to being subjected to the assimilation process. While accepting that the

claimant had indeed signed the Clinical Support Worker job description at pages 81-86 of the bundle, that, submitted Ms Gibb was not fundamentally inconsistent with nor did it operate to prevent the claimant's assertion, made in the course of her grievance meeting and which she would reiterate in evidence at Hearing, that she had taken the SVQ Level 3 qualification at the same time as her comparator.

11. Turning to the question of delay, the claimant's representative accepted that there had been a considerable period of delay particularly at the outset of the process and following the initial request made by the claimant to review responsibilities on the 13th of October 2017. She also accepted, as she was obliged to do, that whereas the assimilation of which the claimant complained took place in 2008/2009, proceedings in the current case were not raised by the claimant until 2021, some 11 years later. She stated, however, that reasons for that included the claimant wishing to await the outcome of the **Beattie** case once it had been commenced in 2013.

12. Notwithstanding the delays, however and whatever the explanation for them may be, in Ms Gibb's submission the result was not to render the conduct of a fair Hearing no longer possible. While she noted the respondent's position that after the passage of time the respondent's witnesses could not remember why, and nor had they retained documentation which might have disclosed precisely why, the comparator had been assimilated to the higher level, the comparator himself was still employed by the respondents and would be available to give evidence. She separately submitted that knowing the answer to precisely why that had occurred may not be essential to the conduct of a fair Hearing, particularly in circumstances where it may be established that the claimant took the SVQ Level 3 qualification at the same time as the compactor and thus that that of itself could not have been the reason for the less favourable treatment. She urged the Tribunal to reject the Application to Strike Out the claim on each of the grounds upon which it was advanced.

13. Regarding the alternative Application for the fixing of a Deposit Order the claimant's representative resisted the same. In circumstances where the claimant, although present was able only to provide incomplete information about her means, the claimant's representative sought a period of time within which to lodge and intimate on behalf of the claimant and her husband with whom she lived as a family unit, a Schedule of Income and shared outgoings, and of savings, together with appropriate vouching. Following discussion as to the amount of time required to produce the same, a period of 7 days was allowed for that purpose by the Tribunal.

Discussion and Disposal

First Ground Rule 37(1)(a) – No Reasonable Prospect of Success

14. The nub of the submission being on behalf of the respondent was, that of the various matters which the claimant required to establish in order to succeed in her complaint, and in circumstances where the claimant did not challenge the validity of the Agenda for Change Job Evaluation Scheme, and taking the claimant's case at its highest for the purposes of today's submissions,

    (a) the claim fell to be determined upon whether the respondents could establish (in terms of section 69(1) of the Equality Act 2010 that the difference in pay was due to a material factor (namely, Application of the Agenda for Change Job Evaluation Process); and

    (b) that reliance on that factor was not directly discriminatory.

15. In circumstances where it was a matter of concession that the claimant did not challenge the validity of the Job Evaluation Scheme, it was self evident in the respondent's representative's submission,

    (a) that the difference in pay was due to a material factor namely the Application of the Agenda for Change Job Evaluation Process and it was apparent, on its face,

(b) that the difference in sex was not a factor taken into account as part of that process and as such,

(c) that Agenda for Change was not directly discriminatory.

16. In these circumstances it was submitted that the claimant's claim enjoyed no reasonable prospect of success.

17. In **Cox v Adecco Group** (EAT) [2021] ICR and the reference contained in it to the dicta of President Choudhury J in **Malik v Birmingham City Council** (unreported) 21 May 2019 and the EAT stated:-

> "29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides: '*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 …*'
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> "30. It is well established that striking out a claim of discrimination is considered to be a draconian step which is only to be taken in the clearest of cases: see *Anyanwu v South Bank Student Union (Commission for Racial Equality)* [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of *Mechkarov v Citibank NA* [2016] ICR 1121, which is referred to in one of the cases before me, *Revenue and Customs Commissioners v Mabaso* "unreported" 27 October 2017"
>
> "31. In *Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must*

ordinarily be taken at its highest; (4) if the claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

"32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In *Community Law Clinic Solicitors Limited v Methuen* (unreported) 8th April 2011, it was stated that in appropriate cases claims should be struck out and that 'the time and the resources of the Employment Tribunal ought not to be taken up by having to hear evidence in cases that are bound to fail".

"33. A similar point was made in *ABN Amro Management Services Limited v Hogben* (unreported) 26 October 2009 where it was stated that, '*if a case has indeed no reasonable prospect of success, it ought to be struck out*'. It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250, and should adequately explain to the affected party why their claims were or were not struck out. In *Elliott v Joseph Whitworth Centre Limited* (unreported), UKEAT/0030/13 MC at [9] and [16] it was stated that where there has been inordinate and inexcusable delay which prevents a fair trial a claim should be struck out. The Tribunal however must look for something more than the 'routine' prejudice which would occur to each party if the case were to either proceed or be struck out such as memories fading or documents of witnesses gone missing."

18. It was submitted by Mr Halliday that the claimant's suggestion that she undertook the SVQ3 training at the same time as her comparator Mr Mitchell was "totally and inexplicably inconsistent" with her answer to questions at the grievance meeting on 22nd June 2022 (grievance meeting notes, joint bundle P113). While I accept that there is inconsistency between the undisputed fact that assimilation took place in 2008/2009, on the one hand, and the claimant's statement made in the grievance process that she completed

SVQ2 in 2010, I did not accept that that inconsistency was either total in the sense of being fundamentally incompatible with, or necessarily inexplicable. If, as the claimant asserted, she took the SVQ3 qualification at the same time as her comparator and, as was again put in issue, her comparator was assimilated prior to his obtaining the SVQ3 qualification, the claimant's assertion would be neither inconsistent nor inexplicable.

19. When the comparator took the SVQ3 qualification and whether that was at the same time as the claimant took the qualification, are issues of fact in dispute between the parties which will turn to some extent and notwithstanding the documentary evidence, on the oral evidence of parties/their witnesses. As such they are issues which should not be decided without the hearing of oral evidence (*Mechkarov point 2*). On the same basis it follows that I am not satisfied the claimant's case is "conclusively disproved by" undisputed contemporaneous documents (*Mechkarov point 4*).

20. Accordingly, and in accordance with the principles in Meek v City of Birmingham District Council, I decline to Strike Out the claim on the first ground contended for under Rule 37(1)(a) – that is – no reasonable prospect of success.

Second Ground Rule 37(1)(e) – No Longer Possible to have a Fair Hearing

21. It is incontrovertible that in this case there has occurred inordinate and in substantial part, at least thus far, inexplicable delay. Whatever may be said by the claimant's representative about the position post 13th of October 2017, the date upon which the claimant made an original request to review responsibilities, there had already elapsed prior to that date, a period of some 7 or 8 years since the disparate assimilation took place in 2008 and 2009 during which no apparent action was taken by the claimant.

22. Nothing was said in the course of submission by the claimant's representative that went to explain that delay. The occurrence of delay of itself however is insufficient to meet the ground set out in Rule 37(1)(e). To succeed under

that ground the delay must have resulted in a circumstance where the Tribunal considers that it is no longer possible to have a fair Hearing in respect of the claim.

23. Under reference to **Elliott v Joseph Whitworth Centre Limited** Mr Halliday submitted that that situation did pertain by reason of the fact that due to the non retention of documentation and the fading memory of the relevant decision makers the respondent was in fact unable to confirm precisely why Mr Mitchell was assimilated to the Clinical Support Worker 2 (higher level) through the Agenda for Change process that being something which had occurred in 2008/2009, some 11 years ago.

24. On the other hand I am told that the comparator himself is still in the employment of the respondent and has not been precognosed by the respondent on the matter. Although the response of Ms Gibb for the claimant appeared to indicate that on a first inquiry the comparator had been unable to explain precisely why, I am not able to consider, on a bald *ex parte* basis, either that the absence of that precise detail renders it impossible to have a fair trial or indeed that the answer to that or similar questions might not emerge in the course of examination and cross examination of witnesses, a process which witnesses often find conducive to assisting them in their recollection. In these circumstances I am not satisfied that the ground set out in Rule 37(1)(e) has been made out, namely I am unable to consider that it is no longer possible to have a fair Hearing in respect of the claim and I accordingly refuse the Application for Strike Out in that separate and cumulative ground.

The Making of a Deposit Order under Rule 39

25. While I have declined to Strike Out the claims, at this juncture in proceedings, without the hearing of evidence on disputed issues of fact I turn to consider the alternative remedy sought on the making of a Deposit Order in the sum of £1000 as a condition of continuing to advance the claim. While the claimant's assertion that she took the SVQ3 qualification at the same time as her

comparator and that both she and the comparator took the qualification after assimilation and thus, that the possession of the qualification *per se* could not have been the determining reason for differential treatment that of itself, taken at its highest and let it be assumed that the claimant were to prove that state of affairs is likely to fall short of what would be required to show that the difference in treatment was due to gender. That particularly so in circumstances in which the claimant does not assert or offer to prove that the Agenda for Change Job Evaluation Process was of itself discriminatory. While such a state of affairs if established might go to support the claimant's allegation that her comparator being allowed to take up the promoted post or role without selective competition in circumstances where she was not allowed to do so may have disadvantaged her that of itself, again falls short of establishing that she was so disadvantaged because she was a woman. While Ms Gibb made passing reference in response to inquiry from the Tribunal on this point to the fact that she believed that historically there were more women in the claimant's position than men that of itself falls short of what would be required to establish "*Enderby type discrimination*" that is to say offering to prove sex discrimination through compelling statistics that women as a group were put at a particular disadvantage to men by the material factor.

26. Separately and in any event, let it be assumed that the claimant were to establish by means of compelling statistics or otherwise, that persons of the female sex were placed at a particular disadvantage by the application of Agenda for Change the claimant's claim would only succeed in circumstances where the respondent was unable to satisfy the Tribunal that the application of Agenda for Change constituted, in the circumstances, a proportionate means of achieving a legitimate aim. While I accept the distinction highlighted by Ms Gibb between the claimants and comparators pre Agenda for Change positions in the current case on the one hand and the case of **Beattie and Lothian Health Board** to which the Tribunal was referred, on the other the Tribunal were unanimously satisfied, on an *esto* basis, in the **Beattie** case, that the same Agenda for Change Job Evaluation Scheme did constitute, in the circumstances, a proportionate means of

achieving a legitimate aim. While the **Beattie** case is of course not binding upon this Tribunal and it is possible that a differently constituted Tribunal might reach a different conclusion on substantially the same evidence that, together with the matters enumerated above combine to result in the Tribunal considering that the claimant's case in the instant case, as currently pled and on the information presented, enjoys little reasonable prospect of success and, in these circumstances the Tribunal's discretion to make a Deposit Order is a condition precedent of continuing to advance the claim is awakened and, is subject to its consideration, upon reasonable inquiry now directed into the paying party's ability to pay any deposit in deciding the amount, considers that a Deposit Order should be made.

27. By email dated 12 September the claimant's representative confirmed that the claimant was able to comfortably pay any sum as may be required under a Deposit Order.

28. The Tribunal being satisfied as to the appropriateness of so doing and in respect of the claimant's ability to pay makes a Deposit Order of £1,000 as a condition precedent of the claimant pursuing her claim.

Employment Judge: Joseph d'Inverno
Date of Judgment: 21 September 2022
Entered in register: 27 September 2022
and copied to parties

I confirm that this is my Judgment in the case of Hutton v NHS Lothian and that I have signed the Judgment by electronic signature.