In The Employment Tribunal

Claim N° 36 of 2019

Between:-

Annabelle Desoiza

Claimant

-and-

His Majesty's Government of Gibraltar

Respondent

Reasons for Decision

Background

1. In September 2003, the Claimant was employed by the Respondent as a Crown Counsel.

2. In February 2004, the Claimant was appointed the Registrar of the Supreme Court ("the Registrar").

3. On the 4th May 2011, there was an administrative ruling put in place by the Respondent to the effect that in exceptional circumstances and with the approval of the Financial Secretary a person on retirement could be awarded greater pensionable emoluments if their last promotion had resulted in the loss of pensionable emoluments ("the Administrative Ruling").

4. Around December 2011, a review of the post held by Senior Officers resulted in the salary for such persons being increased. The Claimant alleges, and the Respondent does not deny, that although a senior officer her salary was not increased.

5. Around October 2012, the Claimant informed the Respondent that she wanted to resign as Registrar and be transferred to a Crown Counsel post.

6. By letter dated the 18th December 2012, the Respondent informed the Claimant that:-

   (a) the Respondent accepted the Claimant's request to step down as Registrar;

   (b) the Respondent agreed for the Claimant to be transferred to the post of Departmental Counsel within the Treasury Department, which was the post she held in 2003;

   (c) the salary scale of Departmental Counsel was similar to that of Registrar;

   (d) the Claimant was to be paid at the highest rate of the applicable salary scale; and

   (e) the said salary scale was "*currently under review*" – it is not known whether the review resulted in the Claimant's salary being increased.

7. The Claimant accepted the terms and conditions set out and, on the 31st December 2012, stepped down as Registrar.

8. On the 1st January 2013, the Claimant commenced work as Departmental Counsel in the Treasury Department.

9. On the 1st February 2013, the Respondent did away with the post of Registrar and substituted it with the new combined post of Additional Stipendiary and Registrar. This post was advertised but the Claimant, not unnaturally, did not apply for it.

10. On the 2nd August 2013, section 16A of the Pension Act came into force; more on this later on.

11. On the 18th September 2014, the Employment (Bullying at Work) Act came into force.

12. In December 2015, it appears the Claimant had a conversation with the Respondent's then Chief Secretary about the possibility of the salary she had been earning in late 2011 and 2012 being increased. I say appears because there is only an oblique reference to this in the e-mail sent on the 11th March 2016.

13. On the 11th March 2016, the Claimant wrote to the Respondent's Chief Secretary making reference to their conversation in December 2015, stating that she had a letter which confirmed that the scale of pay for Registrar had not been increased at the Chief Justice's recommendation and that she was now at a lower grade with higher remuneration, and that she would like an answer as soon as possible. The e-mail is unclear as to what exactly the Claimant expected an answer on. The letter referred to has not been produced.

14. On the 23rd May 2016, the Respondent replied to the Claimant's e-mail of the 11th March 2016 stating that:-

    (a) there was no provision in the Pensions Act whereby "*if you have previously held an office which attracts higher remuneration then your pension will be at the rate of that higher posts remuneration*" but that there was an Administrative Ruling to the effect, which was attached; and

    (b) the ruling did not apply to the Claimant as "*you voluntarily stood down from the post of Registrar and there was no loss of earnings*" and "*the current salary for the post of Registrar was introduced as from 1st February 2013 following the creation of a new post of Additional Stipendiary Magistrate and Registrar which is distinct to the previous Registrar's post*".

    It is notable that this letter makes no reference to an application having to be made prior to the promotion or transfer and that it is incorrect as to the law as at that time.

15. On the 16th August 2016, the Claimant wrote to the Human Resources Manager replying to the letter of the 23rd May 2016. In her letter the Claimant, insofar as matters are relevant to the application now before me, stated that:-

    (a) section 16A of the Pensions Act overrode the provisions of the Administrative Ruling of the 4th May 2011;

    (b) she did not voluntarily step down from the post of Registrar but rather was forced to leave the post as she was suffering from depression and stress due to the treatment she had received;

    (c) parity still applied in Gibraltar and therefore she was forwarding the judicial scales from the UK showing that the remuneration for registrars and magistrates were on the same scale; and

(d) she was renewing her request for "*sight of my personal file together with all documents containing critical remarks about performance and all documents/information containing my personal data*".

I can see nothing in this letter which directly asks the Respondent to reconsider the refusal given in the letter of the 23rd May 2016; albeit that this could by a stretch be implied.

16. On the 30th January 2017, the Human Resources Manager replies to the letter of the 16th August 2016. In this letter, Human Resources:-

(a) accepts the existence of section 16A of the Pensions Act;

(b) states that section 16A did not apply to the Claimant's case because:-

- on the Claimants transfer she was placed on a higher salary as the salary scale for Departmental Counsel was higher than that of Registrar.

- as the Claimant did not hold the restructured post of Additional Stipendiary Magistrate and Registrar she was not entitled to the salary for that new post and neither could that new post be re-graded retrospectively.

The letter ends with the curious statement that the Claimants "*request to have the new Additional Stipendiary Magistrate and Registrar salary applied to you*" could not be acceded to. To my knowledge the Claimant has never in correspondence or during these proceedings stated that she was requesting the pay of Additional Stipendiary Magistrate and Registrar be applied to her.

17. Between the 16th August 2016 and the 16th September 2018 some documentation must have been sent by the Claimant to the Chief Secretary because reference to this is made in the Chief Secretary's e-mail of the 16th September 2018. If so, this "*paper*" has not been produced, so what exactly was being requested by the Claimant is not known.

18. On the 16th September 2018, the Chief Secretary wrote to the Claimant stating that her request to have "*a retrospective re-grading for salary purposes whilst employed as Registrar at the Gibraltar Court Services*" had been turned down for the following reasons:-

(a) at the time the Claimant transferred to the treasury department the Crown Counsel scale was higher than that of Registrar;

(b) since leaving the post of Registrar the post had been reviewed and restructured to incorporate further duties and responsibilities and therefore no claim could be entertained by the Respondent for a retrospective regrade of the new post; and

(c) parity issues should have been addressed by the Claimant when in the post of Registrar and not years afterwards.

I am of the opinion that its this piece of correspondence which constitutes the refusal to regrade which the Claimant complains of.

19. On the 8th February 2019, the Claimant wrote to the Chief Secretary commenting on the contents of his e-mail of the 16th September 2018. In this e-mail the Claimant, amongst other things; stated:-

"I believe I have been discriminated on the grounds of sex in that when I was Registrar, I did not receive the same pay as my comparators who are the Magistrate and Senior Crown Counsels all of which are male".

"I researched this matter and it seems that in 2011 all these grades received a revised salary".

"In fact, your failure to abide by the provisions of the Equal Opportunities Act has caused me financial loss as, had you at the time not discriminated against me, I would have been transferred with my salary in accordance with General Order 9.6.2 as other male comparators have".

"Your discrimination is a continuing discrimination which has affected my salary for the last 8 years and with this in mind, you should be aware that I no longer ask for the payment of my pension at the rate of Registrar, I am now asking for the payment of all outstanding amounts to date together with my pension at a proper rate".

It is notable that in this letter the Claimant appears to be withdrawing her claim for the "payment of my pension at the rate of Registrar".

20. On the 1st April 2019, as the Claimant had not received a substantive reply she again wrote to the Chief Secretary. In this correspondence the Claimant gave information which sought to show to the Chief Secretary that as a result of the review conducted in June 2011 the Registrar's salary was left as it was whilst those of the Magistrate and Senior Crown Counsels were substantially increased. The Claimant further intimated that she was contemplating commencing proceedings with respect to the issues of back pay, pension, sexual discrimination etc.

21. On the 23rd May 2019, the Claimant sent a reminder to the Chief Secretary.

22. On the 24th May 2019 the Chief Secretary replied to the Claimant. In this e-mail the Chief Secretary stated that:-

"In my opinion, you do not disclose any material new fact or argument in either of those items of correspondence that would cause me to reconsider my decision to refuse a retrospective regrading of the post of Registrar (from which post you resigned) for salary or pension purposes".

The e-mail then proceeds to emphasise the following matters:-

(a) the Chief Secretary denied that his discretion had been fettered when not acceding to the request for a re-grading for salary purposes;

(b) the Chief Secretary re-iterated that section 16A was not applicable because the Claimant upon transfer had been placed on a higher salary and that the Claimant could not be retrospectively regraded in the new post created after she had left the Supreme Court;

(c) the Chief Secretary denied that the Claimant had been discriminated against on the basis of sex; and

(d) the Chief Secretary pointed out that a "*Senior Officer*" was not a post but rather an administrative grade.

23. On the 31st July 2019, the Claimant filed with the Tribunal a claim form with eight type written pages annexed to it.

24. On the 23rd August 2019, the Respondent filed its Response in which it denied all allegations of bullying and/or victimisation.

25. On the 10th May 2022, the Claimant applied to amend her claim form to include a claim for sex discrimination under the Equal Opportunities Act.

26. On the 17th December 2025, I was appointed as the Chairman of this case.

27. On the 20th April 2026, the Claimant's application to amend the claim form filed was heard by myself and refused to the extent set out in the Reasons for Decision dated the 7th May 2026.

28. On the 17th July 2026, the Respondent filed an application for the striking out of the Claimant's claim pursuant to Rule 36(1)(a) of the Employment Tribunal (Constitution and Procedure) Rules 2016 on the grounds that the Claimant has no reasonable prospect of success in bringing the claim for bullying and/or victimisation under the Employment Tribunal (Bullying at Work) Act 2014.

29. The striking out application was heard over the course of the 17th and 18th August 2026, with a decision being reserved. Subsequent to the 18th August 2026, I asked, through the Secretary, both parties to submit if they wished to do so, comments on various authorities which neither side had referred to in the course of the hearing held. Both parties made written submissions which I have read and taken into account for the purposes of this decision.

<u>The Claimants case</u>

30. As I understand it the Claimant's complaint(s) are comprised of the following:-

    1. The Claimant complains that around December 2011, when in the post of Registrar of the Supreme Court ("Registrar") her post was not reviewed for salary purposes notwithstanding that the persons in the posts of Magistrate and Senior Crown Counsel (who were all male) did have their posts reviewed and received a material salary increase. Prior to this event the Magistrate, Senior Crown Counsel and the Registrar were all earning the same amount. The Claimant alleges that this discrimination occurred because at the time she was involved in proceedings against the Judicial Services Commission.

    2. The Claimant complains that if the post of Registrar had been reviewed it would have resulted in an increase in her salary, as it did in the case of Magistrate/Senior Crown Counsels, because the work of Registrar required a greater set of skills/experience etc as would be obvious to the man in the street.

    3. The Claimant further complains that because she did not receive the higher salary in December 2011 and/or prior to her moving to Departmental Crown Counsel, when she retired some years after she received less pensionable emoluments than she would otherwise have been entitled to receive.

    4. The Claimant further complains that because the Respondent failed to comply with its Braganza duty when (a) repeatedly failing to review why she had not been awarded a salary increase in 2011 and (b) repeatedly refusing to allow her to rely on the provisions of section 16A of the Pensions Act so as to enable her to become entitled to increased pension emoluments she had been bullied and/or victimised for the purposes of the Employment Tribunal (Bullying at Work) Act 2013.

    When taking account of this, it needs to be borne in mind that some seven years had elapsed between the Claimant filing her claim in this Tribunal and the salary review that took place in December 2011 and that some three years had elapsed between the said filing of the claim and her request for a review/regrade of her pension entitlement.

The Law

31. The power of the Tribunal to strike out all or a part of a claim or response is provided by Rule 36 of the Employment Tribunal (Constitution and Procedure) Rules 2016 ("the Rules"), Rule 36(1) provides as follows:-

> *"36(1) At any stage of the proceedings, the Tribunal may, either on its own initiative or on the application of a party, 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;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(d) that it has not been actively pursued;*
>
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)".*

32. Mr Isola has emphasised that the Respondents application to have all of the Claimant's claim struck out is based on the ground provided for in Rule 36(1)(a); ie that said claim has no reasonable prospect of success.

33. Rule 36(3) of the Rules provides that:-

> *"36(3) where a claim is struck out, the effect shall be as if no claim had been presented".*

34. As required by Rule 3(3) of the Rules, the Tribunal when seeking to exercise the power given to it by Rule 36(1) must seek to give effect to the overriding objective provided for in Rule 3(1); ie to deal with cases fairly and justly, which includes:-

> *(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.*

35. The leading authority as at this time on the principles to be applied by Tribunals when considering strike out applications based on the ground of "*no reasonable prospect of success*" is the case of X ie v e'quipe Japan Limited (2024 EAT 176).

In the judgment handed down Judge James Taylor summarised the core components of the guidance to be applied on the application of the test "*no reasonable prospect of success*"; namely:-

"4. I do need to summarise some of the core components of the guidance relevant to this appeal:-

4.1 Rule 37 of the Employment Tribunal Rules of Procedure 2013 (SI 2013/1237) provides a discretion to strike out a claim if it has no reasonable prospect of success.

4.2 Strike out is a draconian step to be taken only in clear cut cases.

4.3 There is a public interest in discrimination cases being heard on the merits.

4.4 Care should be taken when an application for strike out is made against a litigant in person.

4.5 That said, there is not an absolute prohibition on strike out in discrimination cases, particularly if the claim is contrary to undisputed documentary evidence.

4.6 Where there is a core of disputed fact strike out is generally inappropriate.

4.7 *When assessing strike out the case of the party against whom the application is made should generally be taken at its highest".*

36. Judge James Taylor further held that:-

"6. A core of disputed fact can include the reason why a person took a decision: Ezsias v North Glamorgan NHS Trust (2007) ICR 1126 and Zeb v Xerox (UK) Limited (unreported) 24th February 2016, at para 20. That is why strike out is generally inappropriate in a case that turns on the mental processes of an alleged discriminator and/or a person who took a decision, such as a decision to dismiss.

7. Taking a case at its highest generally requires an assumption that the claimant will establish the facts from which it is contended that discrimination should be inferred: Romanowska v Aspirations Care Limited (unreported) 25th June 2014 and Mechkarov".

37. The Claimant has referred me to the case of Daniel Cox v Adecco and others (UKEAT/0339/19/AT) as authority for the principles to be applied by tribunals when dealing with strike out applications. This case is referred to in the Xie v e'quipe Japan Limited case and followed so in essence both parties are in agreement as to the principles that need to be applied.

38. Both parties have also referred me to the Court of Appeal case of North Glamorgan NHS Trust v Ezsias (2007) IRLR 603. In the case it was held that:-

"It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospects of success when the central facts are in dispute".

39. In the course of delivering judgment Lord Justice Maurice Kay stated:-

"I too accept that there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success – see ED & F Man Liquid Products Limited v Patel (2003) EWCA Civ 472 at para 10 per Potter LJ; a commercial rather than an employment case. However, what is important is the particular nature and scope of the factual dispute in question. In the present case it is stark".

and

> *"It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation".*

40. That then are the provisions in the Rules and the authorities which need to govern how I determine the Respondent's application to strike out all of the Claimants claim.

41. It is to be noted that even if the Tribunal determines that one or more of the grounds set out in Rule 36(1) of the Rules apply (ie that the claim has no reasonable prospect of success) the Tribunal then has to consider whether or not to exercise its discretion to strike out the claim or to make an alternative order. There is therefore a two-stage process to complete. The authority for this is the case of Hassan v Tesco Stores Limited (appeal N° UKEAT/0098/16/BA). In delivering her judgment the Honourable Lady Wise stated as follows:-

> *"This leads me to ground 5. There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. 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.*
>
> *In my view, the Employment Judge's failure to consider whether to exercise his discretion in favour of not striking out following his finding that the claims had no reasonable prospect of success amounts to a clear error of law. While it is not for me to speculate as to how that discretion might have been exercised, the factors that might have weighed heavily include the stage of the proceedings, the ability to direct that Further and Better Particulars of each claim be specified and the absence of any application on the part of the Respondent for striking out.*
>
> *The second stage exercise of discretion in Rule 37(1) is 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".*

<u>The Respondent's Position</u>

42. It is the Respondent's position that the Claimant can only succeed with the claim brought if she can establish that the Respondent's refusal to her request for the regrading of her pension constitutes bullying and/or victimisation for the purposes of the Employment (Bullying at Work) Act 2014 ("the Bullying Act").

43. Mr Isola submits that there is no realistic prospect of the Claimant being able to establish this due to the following and that therefore the claim should be struck out:-

    (a) allegations that pre-date the commencement of the Bullying Act cannot be acts of bullying and/or victimisation for the purposes of the Bullying Act;

    (b) the claim was filed out of time and is therefore statute barred pursuant to the provisions of the Bullying Act;

    (c) the provisions of section 16A of the Pensions Act do not apply retrospectively;

(d) even if section 16A of the Pensions Act is to be applied retrospectively, the Claimant still does not come within its provisions; and

(e) the incident(s) complained of do not amount either to bullying and/or victimisation for the purposes of the provisions of the Bullying Act.

Braganza Duty

44. Before dealing with the Respondents submissions I pause to deal with the Breganza case. The Claimant relies extensively for the purposes of her submissions on the case of Braganza v BP Shipping Limited and another (2015) UKSC 17 ("the Braganza Case"). The case arose as a result of Mr Braganza, the Chief Engineer on board an oil tanker suddenly disappearing whilst the vessel was in mid-North Atlantic. No-one knew what had happened to him but his employers formed the opinion that the most likely explanation for his disappearance was that he had committed suicide by throwing himself overboard with the result that his widow was not entitled to the death benefits provided for in his contract of employment. The case brought by Mrs Braganza raised two inter–linked questions of principle, one general and one particular. Lady Hale in the course of giving her judgement stated:-

> *"Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties bargain for them, still less to substitute themselves for the contractually agreed decision – maker.*
>
> *Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened when there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given".*

and

> *"It is clear, however, that unless the Court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose".*

and

> *"But whatever term may be implied will depend upon the terms and the context of the particular contract involved".*

45. My understanding of this case is that it is not authority for the general proposition that an employment tribunal can substitute its own view whenever it is alleged that an employer made an unreasonable contractual decision. Rather where a contract gives one party a discretion or power to make a decision affecting the other party the essence of that discretion may be subject to an implied constraint, ie the decision maker must act honestly and in good faith, rationally and without taking into account irrelevant matters or failing to take account of relevant matters.

46. Neither of the parties referred to me any authority in which the Braganza duty was an issue in a claim for unfair dismissal, harassment, victimisation and/or bullying. I researched the matter and come across the following cases:-

Matthews v Vitality Corporate Services Limited – 1401765/2022.
Hemphill v Great Westem Hospitals NHS Foundation Trust – 1402954/2022.
Turner v National Highways Limited – 3313411/2022.
Choudhury v Castleplus Limited – 3202092/2019.
Langford v Avalon Motor Co Limited – 1401564/2022.
McKenzie v First Greater Westem Limited – Aziz v The Freemantle Trust (2018) EWCA Civ 2005 (2026) EWHC 868.

were the Braganza case was referred to. Both parties were given the opportunity to comment on these cases. In my opinion the general principle that can be garnered from these cases is that if an employer has a discretion making power in relation to a grievance, bonus, promotion or other contractual entitlement and the employee alleges that the decision maker:-

- ignored relevant evidence.
- relied on irrelevant matters.
- acted arbitrarily.
- failed to investigate obvious matters.
- reached a predetermined conclusion

then Braganza may provide a contractual rationality framework for a contractual claim which could sit alongside but not be a claim under the Bullying Act. Braganza cannot turn a statutory claim into a Braganza claim; any challenge to the lawfulness of the exercise of a statutory power would need to be considered under the appropriate public-law principles. It follows from this that if there were a validly filed contractual claim before me then the Claimant could possibly rely on the principles in the Braganza case. But this is not what is before me; the claim is in respect of the statutory claims of bullying and/or victimisation and therefore the Braganza case is of no relevance for the purposes of ascertaining whether there has been bullying and/or victimisation unless, possibly, if the claim had been brought under the provisions of section 4(2)(c) or (d) of the Bullying Act, which is not the case here.

47. Moreover, the Claimant has not pleaded a breach of a contractual discretion or alleged any breach of her employment contract, has not asserted that the failure to review her salary in December 2011 was a contractual breach of a discretion, has not alleged that the failure to provide her with a salary increase contravened a provision in her employment contract or the failure to exercise a discretion and indeed has not referred at all to the provisions or the terms and conditions of her employment contract or to any purported discretion thereunder. The closest she has come to mentioning her employment contract is to state that *"the Pensions Act became part of the Claimant's employment contract because the appointment letter states that you are permanent and pensionable. Therefore, incorporating the terms of the Pensions Act*". The Claimant therefore does not raise Breganza in relation to a discretionary contractual matter but rather in a totally different ambit, namely in that the Respondent refused on numerous occasions to exercise its Breganza duty when refusing to exercise the discretion granted to it under section 16A of the Pension Act. In my opinion in order to assert a Breganza duty there has to be an assertion that a specific contractual provision places a contractual discretion on the employer which the employer has exercised and in doing so has ignored relevant evidence, relied on irrelevant matters, acted irrationally, failed to investigate obvious matters and/or reached a predetermined conclusion. The Claimant has made no such contractual assertion and therefore her assertion of a Breganza duty in the abstract is not one that this Tribunal can take account of. It is even less so when the Breganza principles are raised in connection with the statutory discretion afforded by section 16A of the Pensions Act.

The Pensions Act

48. Clause 2(7) of the Pensions (Miscellaneous Amendments) Act 2013 amended the Pensions Act and introduced a new section 16A, which provides as follows:-

> *"Compensation for certain retiring officers.*
>
> *16A. Where:-*
>
> *(a) an officer has been promoted or transferred from a pensionable office ("the first pensionable office") in which he had been confirmed to another pensionable office ("the second pensionable office") in which he has been confirmed and subsequently retires; and*
>
> *(b) where the annual pensionable emoluments the officer would have enjoyed if he had remained in the first pensionable office would have been higher than those that he enjoys in respect of the second pensionable office,*
>
> *he may, with the approval of the Government, be deemed, for the purpose of computing the amount of pension, to have remained in the first pensionable office and service in the second pensionable office shall, with respect to pensionable emoluments, be taken into account as though it were service in the first pensionable office on the terms which he enjoyed immediately prior to such promotion or transfer".*
>
> Pursuant to the provisions of section 1(8) of the afore-mentioned Pensions (Miscellaneous Amendments) Act 2013, section 16A came into operation on the 2nd August 2013.

49. This section is central to the submissions of both parties. In the case of the Respondent the submissions made are as follows:-

> 1. As section 16A of the Pensions Act only came into force on the 2nd August 2013, this being some eight months after the Claimant transferred from being Registrar to Departmental Counsel, and as section 16A cannot be applied retrospectively, the Claimant is precluded from being able to rely on section 16A of the Pensions Act;
>
> 2. Even if section 16A of the Pensions Act can be interpreted retrospectively, the provision cannot be relied upon by the Claimant since her case does not meet the required criteria in either of two respects. Firstly, in order to rely on section 16A an application to Government for its approval for the higher pensionable emoluments to apply upon retirement has to be made before an officer is promoted or transferred and not subsequently after leaving office. The Claimant made no such application prior to her transfer in January 2013, and indeed only sought such approval in possibly December 2015, but certainly in March 2016 (ie at worst over three years after the transfer occurred and, at best, just before three years since the transfer occurred) and therefore she cannot rely on the provisions of the section. Secondly, in order to enjoy the benefit of the provision, the officer in question must have enjoyed annual pensionable emoluments in his first pensionable office which where higher than those enjoyed by the officer in the office he was in at the time of his retirement. The Claimants pensionable emoluments in the office she occupied at the time of retirement (Departmental Counsel) were in fact higher than that applicable to her when she was Registrar and consequently section 16A is not applicable to her case.

50. In the case of the Claimant the submissions made are as follows:-

1. Section 16A of the Pensions Act is to be applied retrospectively as section 3(5) as read with section 3(3) of the Pensions Act provides. These provisions read as follows:-

"(3) Whenever the Government is satisfied that it is equitable that any regulation made under this section should have retrospective effect in order to confer a benefit upon or remove a disability attaching to any person, that regulation may be given retrospective effect for that purpose.

Provided that no such regulation shall have retrospective effect unless it has received, before being made, the approval of the Parliament signified by resolution".

"(5) Any pension, gratuity or other allowance granted under this Act shall be computed in accordance with the provisions in force or, having been made in accordance with subsection (3), which may be deemed to be in force at the actual date of an officer's retirement or death while in the public service, as the case may be".

The Claimant submits that as a result of these provisions section 16A is to be interpreted as applying to all those persons who were in Government prior to the 2nd August 2013 and subsequently retired, irrespective of whether or not they were promoted or transferred before or after the 2nd August 2013, and therefore section 16A is applicable to her circumstances.

2. As I understand it, the Claimant is submitting in the alternate that section 16A is not applicable to her case because of the wrongful actions of the Respondent in failing to properly review the Registrar's salary when she was in office and therefore it would be inequitable for the Tribunal to allow the Respondent to now rely on the provisions of section 16A to defeat her claim. This being more so as the Administrative Ruling in place prior to the bringing into force of Section 16A of the Pensions Act would have applied to her.

51. A comparison of the wording of the Administrative Ruling of the 4th May 2011 with that of the provisions of section 16A of the Pensions Act shows that whilst similar in wording there are nevertheless the following material differences:-

(a) the Administrative Ruling only applies to officers who have been promoted from a pensionable office whilst section 16A of the Act applies to officers who have been promoted or transferred from a pensionable office – this is material in the Claimants case because she was transferred and not promoted when she moved from the post of Registrar to that of Departmental Counsel as the letter of the 18th December 2012 made clear; and

(b) the Administrative Ruling refers to the need for there to be "*exceptional circumstances*" and the approval of the Financial Secretary before the officer could be entitled to the higher pensionable emolument whilst section 16A is less restrictive since there is no reference to "*exceptional circumstances*" and the approval is to be given by Government and not the Financial Secretary – once again, this is material to the Claimants case since she made no application to the Financial Secretary, all her correspondence being to the Chief Secretary or Human Resources Manager.

52. The issue arises because of the Respondent's submission that the Pensions Act came into force some eight months after the Claimant transferred to Departmental Counsel, and as section 16A was not retrospective in nature and, as the Claimant did not prior to transfer make any application for the purposes of the administrative ruling and/or the Act, the provisions of the Pensions Act and/or the Administrative Ruling could not be relied upon by the Claimant. It seems to me clear and as I so find that the Claimant was not caught by the provisions of the Administrative Ruling since she, as is fully accepted, was transferred and not promoted and she never made any application to the Financial Secretary or raised any exceptional circumstances.

53. This then brings me to the question whether for the purposes of section 16A an application to Government for the provisions of that section to apply to the officer has to be made prior to that officer being transferred from one pensionable office to another. In my opinion there is nothing in the wording of section 16A which suggests or requires that approval of Government is required prior to the officer being transferred from one pensionable office to another; indeed, the use of the words "*has been promoted or transferred*" indicates the opposite. I have been referred to the Chief Minister's comments in Hansard when the Pensions (Miscellaneous Amendments) Act 2013 went through its second reading in Parliament. It does not seem to me that this adds anything to the argument. In the circumstances, it is my opinion, and I so find, that the Claimant was entitled to apply for the provisions of section 16A to be applied to her circumstances after she had been in post as Departmental Counsel.

54. Turning then to the questions of whether (a) section 16A can be applied retrospectively to the Claimant's circumstances and (b) if so, whether she met the criteria required for the proper applicability of section 16A.

55. Clearly the wording of section 16A is such that it cannot be interpreted as being a provision that is to be applied retrospectively. The question then is whether section 3(3) of the same Act can be said to give section 16A the retrospective effect which the Claimant submits is the case. In my opinion section 3(3) is of no assistance to the Claimant since (a) there is nothing to indicate that Government was satisfied that it was equitable to confer a benefit on the Claimant and that therefore section 16 should be applied retrospectively – indeed the opposite appears to be the case and (b) there has not been the approval of Parliament signified by resolution to the effect that section 16A should be given retrospective effect in the case of the Claimant or any other person. As section 3(3) is not engaged it means that section 3(5), to such an extent as may be applicable, is likewise not engaged and therefore neither provision can be relied upon for the purposes of interpreting section 16A insofar as the Claimants case is concerned. I therefore find that section 16A cannot be applied retrospectively and that consequently the Claimant is precluded from being able to rely on its provisions.

56. In the event that I am wrong in this and section 16A can be interpreted retrospectively, I now turn to consider whether the Claimant meets the criteria necessary to trigger section 16A applicability. I have already found that it is not necessary for a person to apply for section 16A to be applied to them prior to their moving to the higher salaried office; such application can, as in the case of the Claimant, be made once they have been promoted or transferred to the second pensionable office. Having said this, I am of the opinion that the Claimant does not meet the criteria for section 16A applicability because when she was transferred the annual pensionable emoluments in the first pensionable office were lower than those she was entitled to receive upon transfer. The wording of the section is clear and unambiguous. The Claimant may well complain that had a salary review taken place when she was Registrar and had such a salary review led to an increase in salary that such salary would obviously have been higher than that of Departmental Crown Counsel (all of which can be said to be based on assumptions) but all of this does not hide the fact that when she transferred the salary of the post to such she went, quite happily and in the full knowledge that she would be earning more, was higher that

that which she left. I find that the Claimant did not meet the criteria prescribed by section 16A.

Employment (Bullying at Work) Act 2014

57. The Bullying Act came into operation on the 18th September 2014 and, insofar as bullying and victimisation is concerned, provides as follows insofar as it is pertinent to the present application:-

"Meaning of bullying

4.(1) A person ("A") subjects another person ("B") to bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.

(2) In subsection (1) the reference to conduct means:-

(a) persistent behaviour which is offensive, intimidating abusive, malicious or insulting;

(b) persistent unjustified criticism;

(c) punishment imposed without justification;

(d) changes in the duties or responsibilities of B to B's detriment without reasonable justification.

(2A) For the purposes of subsections 4(2)(b), (c) and (d), the conduct in question must include behaviour which is offensive, intimidating, abusive, malicious or insulting.

(3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee's employment.

Meaning of Victimisation

5.(1) A person ("A") victimises another person ("B") if A treats B less favourably than A treats or would treat other persons in the same circumstances and does so by reason of the fact that, or by reason of A's knowledge or suspicion that, B has:-

(a) brought or intended to bring, or intends to bring, proceedings under this Act;

(b) given or intended to give, or intends to give, evidence or information in connection with proceedings under this Act;

(c) otherwise done, intended to do, or intends to do, any other thing under or by reference to this Act;

(d) has alleged or intended to allege, or intends to allege that A or any other person has contravened this Act.

(2) Subsection (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith".

58. By virtue of the provisions of section 3(2) of the Bullying Act its provisions are binding on the Crown.

59. The jurisdiction of the Employment Tribunal to hear bullying and victimisation cases is provided for in section 8 of the Bullying Act which states as follows:-

> *"8.(1) Without prejudice to his right to remedies for breach of contract and any other right of action, a complaint by an employee ("the complainant") that another person ("the respondent") has contravened this Act may be presented to the Tribunal.*
>
> *(2) The Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal within the period of three months beginning when the act complained of is alleged to have been done.*
>
> *(3) The Tribunal may nevertheless consider any such complaint or claim which is out of time, if, in all the circumstances of the case, it considers that it is just and equitable to do so.*
>
> *(4) For the purposes of this section any act extending over a period or any persistent or recurrent contravention of sections 6 or 7 shall be treated as done at the end of that period or at the date of the last such act".*

The Respondent's Submissions

60. The Respondent makes the following submissions with regard to the Bullying Act:-

1. In Paragraph's 3 to 40 of the annex attached to the Claim filed, the Claimant refers to events which occurred prior to the 18th September 2014 when the Bullying Act came into effect. As the case of Perera v Gibraltar Port Authority held (Case Ind Tri 13/2015), and indeed as the Claimant herself accepted, the provisions of the Bullying Act do not have retrospective effect and therefore the Claimant is not entitled to present complaints based upon acts or omissions which occurred prior to the 18th September 2014. It follows from this that the Tribunal has to strike out/dismiss any alleged acts of bullying or victimisation that arose/occurred prior to the 18th September 2014.

2. With regard to acts alleged to have occurred after the 18th September 2014 these acts cannot be considered by the Tribunal since the claim alleging them was filed outside of the 3 month statutory period provided for by section 8(2) of the Bullying Act, ie outside the 3 month period beginning with the date complained of is alleged to have been done/occurred. The Respondent points out that the act of bullying/victimisation the Claimant alleges for the purposes of her claim is the Respondent's refusal to consider her request for the regrading of the post of Registrar as at the time she was holding that post. Such a request was refused by the Respondent at best on the 23rd May 2016 and, at worst on the 16th September 2018. Irrespective of whichever of these dates one settled on, as the claim was not filed until the 31st July 2019, and as no application for an extension of time has been made, the claim was filed outside of the 3 month period provided for in section 8(2) of the Bullying Act and therefore the Tribunal has no jurisdiction to determine it. Moreover, the Claimant could not rely on the proposition that the repeated refusals of her request for regrading constituted continuing acts which extended the commencement of the 3 month period because of the cases of Apelogun – Gabriels v London Borough of Lambeth and another (2002) IRLR 116 (the Court of Appeal holding that the pursuit of domestic grievance or appeal procedures does not normally constitute a sufficient ground for delaying the filing of an appeal/claim) and Sougrin v Haringey HA (1992) IRLR 416 (the Court of Appeal holding that the employer's decision to regrade the claimant at a lower grade than a white comparator which created a resultant pay

discrepancy was not a continuing act which extended the 3 month time limit for presentation of a claim).

3. The Act complained of by the Claimant, the refusal to regrade the Registrar's post, was a single isolated incident and therefore in accordance with the Court of Appeal's decision in Stagnetto v Cassaglia and Gibraltar Health Authority (2022) Gib LR 30, could not be conduct falling within section 4(2)(a) or (b) of the Bullying Act as it was not persistent in nature. Moreover, in any event, the conduct complained of could not, objectively viewed, be seen to be offensive, intimidating, abusive, malicious or insulting as statutorily required in order to constitute bullying and it could not have caused the Claimant to have been alarmed, distressed humiliated or intimidated. In all the circumstances, the claim for bullying should be struck out.

4. The Claimant's complaint that the Respondent refused her application to regrade for pension purposes the Registrar's post, and/or the subsequent re-iteration of that refusal, could not amount to victimisation for the purposes of sections 5 and 7 of the Bullying Act. The Respondent did not treat the Claimant less favourably than other persons in the same circumstances and the refusal or repeated refusals of the Claimant's application to regrade for pension purposes the Registrar's post, could not, without more constitute victimisation under the Bullying Act. The Claimant had failed to identify any facts capable of demonstrating that the Respondent treated her less favourably than it would have treated another in materially the same circumstances.

Claimants Submissions

61. With reference Mr Isola's submission that the Tribunal has no jurisdiction to determine allegations of bullying and/or victimisation based on acts and/or omissions which predate the 18th September 2014, the Claimant has conceded the point and, as I understand it, agreed that for the purposes of her claim the acts and omissions that may be alleged in paragraph's 3 to 40 of the annex to the Claim Form cannot be determined by the Tribunal as amounting to bullying and/or victimisation as they precede the coming into operation of the Bullying Act. It is right and proper that the Claimant should have conceded this point as I would in any event have so determined and do so determine.

62. With reference Mr Isola's submission that the Tribunal has no jurisdiction to determine the claim for bullying and/or victimisation as said claim was filed outside of the three-month period prescribed by Rule 8(2) of the Bullying Act the Claimant submits as follows.

63. The conduct the Claimant is relying on for the purposes of her claim for bullying is, as I understand it, that prescribed by section 4(2)(a), namely persistent conduct that was offensive, abusive or insulting. The persistent conduct was not the Respondent's various refusals to her request for the regrading of the salary but rather the refusal of the Respondent to exercise their Braganza duty, ie failing to take into account what was plainly obvious to the man in the street, this being that her salary as Registrar was incorrect since how could you have a Crown Counsel on a higher salary than the Registrar. The Claimant's allegation is that every senior officer in Government received an increase in salary except her and when she raised the matter the Respondent persistently failed to comply with its Braganza duty; the failure to comply with its Braganza duty was not a one-off act but rather a persistent recurrent contravention of sections 6 and 7 of the Bullying Act. The Claimant further goes on to submit that as section 8(4) of the Bullying Act provides that "*any act extending over a period or any persistent or recurrent contravention of sections 6 and 7*" are to be treated as having been "*done at the end of that period or at the date of the last such act*" it means that the last refusal to comply with its Braganza duty was on the 24th May 2019 and, as her claim was filed on the 31st July 2019, it was filed within the three-month statutory period. The Claimant further submits that the case of Apelogun

–Gabriels v London Borough of Lambeth and another relied upon by the Respondent is not applicable to the case before this Tribunal as that case dealt with a race relations matter and in particular to discrimination cases. The Claimant makes the same point with reference the case of Sougrin v Haringey Health Authority.

64. I note that the Claimant's submissions on this point are really with reference to the bullying claim as she has not referred to the victimisation claim when making these submissions.

65. Taking the Claimant's submissions at there highest the submissions made by the Respondent seem to me to raise two questions; namely can an alleged breach of one's Braganza duty be conduct which engages the provisions of section 4(1) and or section 5(1) of the Bullying Act and, if so, is the failure to comply with the Braganza duty a single or continuing act extending over a period of time. I will deal with the second question first.

66. Any alleged failure by the Respondent to exercise its Braganza duty meant that the Claimant's request for her salary to be regraded for her time as Registrar and, therefore for her pension emoluments to be increased, was refused, had the consequence that she retired on a lower pension. On the assumption that Breganza applies, any alleged failure to exercise the Braganza duty clearly had and has continuing consequences for the Claimant as she received and did receive a lower pension entitlement. But applying such an assumption, I find that it is the consequences of the alleged failure to apply the Braganza duty which would be the continuing element in the situation; the alleged refusal to apply the Braganza duty, and therefore to regrade the salary, would therefore be a single and not a persistent or continuing act. The fact that in his e-mail of the 16th September 2018, the Chief Secretary refers that "*it has been Government policy, for some time now, not to entertain claims for retrospection*" did make me pause as it appears to suggest that it was the Respondent's policy not to entertain the Claimant's claim. However, as the documentation filed shows that the Respondent did consider the Claimants various complaints it does not seem to me that if there was such a blanket policy this was the reason why the Claimant's request was refused. Moreover, as referred to earlier on in this decision, it is my opinion that the alleged breach of the principles in the Braganza case cannot be the foundation upon which a claim for bullying can be brought pursuant to sections 4(1), as read with section 4(2)(a) of the Bullying Act.

67. The outcome of the above is that I agree with Mr Isola and find that (a) the refusal to regrade the Registrar's salary was a one-off and not a continuing act and therefore the provisions of section 8(4) of the Bullying Act and/or any other authority are not engaged (b) the refusal operated as at 16th September 2018 (since in my opinion this was the date on which the refusal first properly occurred) and therefore the claim should have been filed by the 15th December 2018 and (c) the claim was not filed within the statutory three-month period.

68. In the event I am wrong in this I now turn to consider the other grounds raised by the Respondent.

69. With reference the Respondent's submission that the refusal to regrade the salary of the Registrar's post could not be an act of bullying for the purposes of section 4(2)(a) of the Bullying Act, as held in the case of Stagnetto v Cassaglia and Gibraltar Health Authority (2022 Gib LR 30), the Claimant submitted as follows. The refusal to regrade was not a single act, it was persistent conduct. The conduct was an abuse which was unreasonable and unfair; an abuse because it undermined her eight years of work as a Registrar since they were in effect stating that such work was worth less than that of Crown Counsel and as a result, she suffered detriment and distress as the Respondent well knows as it holds her medical records. Having considered at length the Claimants submissions it does not seem to me that her arguments have merit. It does not seem to me that even if one accepts that the Respondent failed to comply with its Breganza duty, and that the repeated refusals to acceded to the request to

regrade was a continuing or persistent act, which I have already held is not the case, that such conduct could objectively viewed amount or amounted to an act of bullying under the Bullying Act. There may well have been a breach of contract, or the conduct might possibly have amounted to a claim for constructive dismissal but it does not seem to me right to call it bullying. As Elias LJ stated in the Cassaglia case:-

> *"However, the implications of being characterised as a bully are serious, and there is no reason to suppose that Parliament intended to extend that concept of bullying so as to catch categories of conduct which, whilst unreasonable or unfair, would not typically be perceived to justify that epithet".*

I cannot see how objectively viewed it can be said that saying "no" to a request to retrospectively regrade the salary of a post, which in essence no longer existed could, even if stated more than once, be said to be offensive, intimidating, abusive, malicious or insulting for the purposes of the Bullying Act. I don't doubt that the Claimant was distressed on learning that her request had been refused but to characterise this as bullying in the circumstances of this case is stretching the limits of section 4(1) and (2)(a) beyond what Parliament could possibly have intended.

70. With regard to the Respondent's submissions that the refusal to retrospectively regrade the salary of the Registrar's post, and/or the subsequent re-iteration of that refusal, could not be conduct that amounted to victimisation simply because the Respondent did not treat the Claimant differently to other persons elicited the following submission from the Claimant. Section 5(1) of the Bullying Act requires the Respondent to have knowledge or suspicion that the Claimant intended to bring proceedings and they must have had the suspicion that she was going to do so. Moreover, the Respondent did subject her to victimisation by subjecting her to a detriment, namely the receipt of less pension.

71. It does not seem to me that the Claimant in her submissions dealt with the issue of whether the Respondent treated her less favourably than other persons in the same circumstances as those of the Claimant. There is no evidence to indicate, and no suggestion made by the Claimant, that the Claimant's request for the regrading of the salary of the post of Registrar was dealt with by the Respondent any differently to that of any other person in the same or similar circumstances as the Claimant. This being the case, I am of the opinion and find that the Claimant does not have a realistic possibility of succeeding with her victimisation claim.

72. Having found that the Claim was not filed within the requisite three-month period prescribed by section 8(2) of the Bullying Act this Tribunal has to strike out the Claim for want of jurisdiction and therefore there is no question of my being able to consider whether I have a discretion to make an alternative order or even how to exercise my discretion in all the circumstances of the case. Having said this, had I had such discretion I would have exercised it in favour of striking out the Claim in any event.

Conclusion

73. In all the circumstances of the above I am satisfied that the Claimant has no reasonable prospect of success and, in the circumstances, I order the striking out of the Claim such as it is.

Dated this 13th day of October 2026

Joseph Nuñez
Chairman