



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

Case No: 4112589/18 Held on 1 July 2019

Employment Judge: N M Hosie

10

Mrs C Brown

Claimant  
In Person

15

Andron Contract Services Ltd

Respondent  
Represented by  
Ms Z Tariq –  
Peninsula

20

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25

The Judgment of the Tribunal is that:-

30

1. the complaint of indirect race discrimination has “*no reasonable prospect of success*” and is struck out in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013;
2. the Tribunal has jurisdiction to consider the complaint of “harassment by association” (subject to determination of the time-bar issue); and
3. a preliminary hearing should be fixed to consider further case management and, in particular, other potential complaints and determine further procedure.

35

**E.T. Z4 (WR)**

## REASONS

### Introduction

- 5 1. Mrs Brown submitted a claim form on 15 July 2018 in which she intimated complaints of unfair dismissal and “indirect racial discrimination and victimisation”. She is not represented.
- 10 2. In its response form, the respondent denied the claim in its entirety, raised a number of preliminary issues and requested further and better particulars of the claim.
- 15 3. A preliminary hearing was held on 2 October 2018 to consider management of the case. The hearing was conducted by Judge Hendry who gave various directions to the claimant, recognising that she was unrepresented. I refer to his Note dated 9 October 2018.

### Further and Better Particulars

- 20 4. On 26 October, the claimant provided further and better particulars of her claim. They are referred to for their terms. The respondent’s representative replied by e-mail on 9 November. She continued to maintain that the claimant had failed to fully particularise her claim and also contended that the claim was out of time.

25

### Dismissal of the Unfair Dismissal Complaint

- 30 5. At the preliminary hearing on 2 October, Judge Hendry advised the claimant that she did not have the requisite two years’ continuous service to bring a complaint of “ordinary” unfair dismissal. On 21 December 2018 I issued a Judgment striking out the unfair dismissal complaint.

**Case Management Preliminary Hearing on 21 February 2019**

6. I conducted a further case management preliminary hearing on 21 February following which I issued a Note on 25 February in which I directed the parties, amongst other things, to make written submissions as to whether the claim should be struck out as having, “*no reasonable prospect of success*”, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure and whether the claimant should be required to pay a deposit as a condition of continuing with the claim on the basis that it has “*little reasonable prospect of success*” in terms of Rule 39. My Note is referred to for its terms.

**Written Submissions**

7. The respondent’s representative made submissions by way of e-mail on 12 March 2019; the claimant responded by e-mail on 26 March; and the respondent’s representative made further submissions by e-mail on 9 April. All of these are referred to for their terms.

**Conclusion**

20

**Indirect Discrimination**

8. This is a complaint under s. 19 of the 2010 Act. However, this complaint was only intimated in the claim form and the claimant readily accepted that there was no factual basis for such a complaint. She maintained that this should have been a complaint of “discrimination by association”. However, as the respondent’s representative submitted, indirect discrimination by association is not a competent claim under the Equality Act 2010.
9. I had little difficulty in arriving at the view that this complaint has “*no reasonable prospect of success*”. It is struck out, therefore, in terms of Rule 37(1)(a) of schedule 1 of the Rules of Procedure.

**Harassment related to Race**

10. This is a complaint under s.26 of the 2010 Act.

5 11. In my Note following the Preliminary Hearing on 21 February I suggested that the claimant might have a complaint of so-called “discrimination by association”.

10 12. In her further and better particulars, the claimant alleged that a colleague (“MB”) had made various comments which were racially motivated.

13. Helpfully, the respondent’s representative detailed these in her submissions on 12 March 2019:

15 *“a. From August 2017 MB checked CCTV footage every day when he arrived at work to monitor Nigerian night security staff to see what work they were doing and then reported this to Robert Cooper. He didn’t check CCTV when Karen (who was white/Scottish) was on nightshift.*

20 *b. On a daily basis he would call them names behind their back and withhold information or misinform them about instructions and how to perform their duties in order to make them look incompetent.*

25 *c. Mid October 2017 MB had said to me, Stephanie and Claire (receptionists) Robert had been interviewing another security guard and his words were, “and you’re not going to believe this but it’s another fucking coon. Why does Robert insist on hiring fucking Nigerians? They’re lazy and useless. Surely you’re not going to tell me that there isn’t a single white guy out there that he can get instead”.*

30

14. While the respondent denies these allegations, I am of the view that these averments provide the claimant with a basis for a complaint of, “harassment by association”. Although the claimant is Scottish and white and does not possess the protected characteristic (race) about whom those comments were allegedly made, I was satisfied that this is a competent claim.

35

15. Indeed, the EHRC Employment Code (2011) (“the Code”) confirms that, “*related to a protected characteristic has a broad meaning*”. Conduct will fall within s.26(1)(a) where it is related to the worker’s own protected characteristic, or where there is any connection with a protected characteristic, “*whether or not the worker has that characteristic themselves*” (see paras. 7.9-7.10).
16. In order to found a claim of harassment under s.26, the conduct in question does not need to be directed at the employee. The Code gives the example of a white worker who is offended by a black colleague being subjected to racially abusive language (see para. 7.10). That was the position in the present case.

### Time-bar

17. However, while, very fairly, the respondent’s representative accepted these alleged unlawful acts, if proved, would meet the definition of harassment under s.26(1), she contended that the complaints were out of time. They were not presented to the Tribunal before the end of the period of three months beginning with the effective date of the last act, being 20 December 2017 (the ACAS EC Notification is dated 4 July 2018 and the Certificate was issued on 5 July 2018). It will be necessary to decide, having regard to the “overriding objective” in the Rules of Procedure, how best, procedurally, to consider and determine this issue.

### Victimisation Complaint

18. This is a complaint under s.27 of the 2010 Act.
19. The “protected act” the claimant appears to rely on is the grievance which she raised on 15 January 2018. However, as the respondent’s representative submitted, the claimant does not allege that she raised any concerns prior to

that date and the various alleged detriments she refers to occurred *before* she raised her grievance.

20. I arrived at the view, therefore, that the submissions in this regard by the  
5 respondent's representative were well-founded.

21. I am minded, therefore, to also strike-out this complaint on the ground that it has no reasonable prospect of success.

10 22. However, as the respondent's representative referred to in her submissions, on 9 April at paras. 11-14, the claimant has also made reference to "alleged protected acts". But, the dates of these acts: "*I had reported MB's behaviour, attitude and racism to Robert Cooper* and "*the protected act was reporting Mike's behaviour and racism to Robert Cooper*", are not specified. **I direct  
15 the claimant, therefore, within the next 14 days, to advise the Tribunal and at the same time copy the respondent's representative as to when these alleged protected acts occurred and the manner in which she communicated them to Robert Cooper.**

20 **Constructive dismissal as an act of discrimination?**

23. The respondent's representative addressed this issue in her submissions on 9 April as follows:-

25 "*9. It appears that the claimant now suggests that her alleged constructive dismissal was an act of discrimination. It may therefore be necessary to assess whether the alleged earlier wrongful acts potentially form part of a course of conduct concluding with the alleged constructive dismissal.*

30 "*10. It is acknowledged that the Tribunal may consider it appropriate to reserve the issue as to whether there is potentially such a course of conduct to be determined at a final hearing.*"

35

24. I remain unclear as to the claimant's position in this regard. As the claimant is unrepresented, I am of the view that it would be helpful to have a further Preliminary Hearing, by way of telephone conference call, to consider this and all other outstanding issues and determine further procedure.

5

10

15

20

25

<b>Employment Judge:</b>	<b>Nicol Hosie</b>
<b>Date of Judgment:</b>	<b>01 July 2019</b>
<b>Date sent to parties:</b>	<b>02 July 2019</b>