EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4106831/19 & 4110429/19

Held on 24 October 2019

Employment Judge N M Hosie

Mr B Taylor	**Claimant** **In Person**
Tesco Stores Limited	**Respondent** **Represented by** **Ms H Brannan -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(1) the complaint of *"direct discrimination by association"* has "*little reasonable prospect of success*" and the claimant is ordered to pay a deposit of a sum yet to be determined, as a condition of continuing to advance that complaint;

(2) the complaint of *"victimisation by association"* is dismissed, for want of jurisdiction; and

(3) the complaint of *"harassment by association"* has "*little reasonable prospect of success*" and the claimant is ordered to pay a deposit of a sum yet to be determined, as a condition of continuing to advance that complaint.

REASONS

Introduction

1. The claimant, Ben Taylor, remains in the respondent's employment. He is employed at their store in Lerwick as a "Customer Assistant". He started his employment with the respondent on 12 November 2014.

2. On 10 May 2019, Mr Taylor submitted a claim form against the respondent in which he intimated various complaints of race discrimination, all by so-called "association" (Case No: 4106831/19). He is a white British male. His claim is based on his association with a work colleague, Mr G Reid, who is of Afro-Caribbean descent. He brought complaints of direct discrimination in terms of s.13 of the Equality Act 2010, harassment in terms of s.26 and victimisation in terms of s.27. The claim is denied in its entirety by the respondent.

3. On 26 August 2019, Mr Taylor submitted a further claim form against the respondent (Case No: 4110429/19) in which he intimated further complaints of harassment and victimisation on the same basis of associative discrimination. This claim is also denied in its entirety by the respondent.

4. On 8 October 2019, I issued a Judgment that the two claims be conjoined and considered together.

5. After various procedures for case management purposes, I decided, having regard to the *"overriding objective"* in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"), that a preliminary hearing should be fixed to consider the "prospects" of the claim succeeding. I would consider 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; or alternatively, whether the claimant should be ordered to pay a deposit as a condition of being allowed to proceed with his claim on the basis that it has *"little reasonable prospect of success",* in terms of Rule 39.

6. After discussion, it was agreed that the issue of "prospects" would be addressed by way of written submissions. I had regard, therefore, not only to the parties' written submissions in relation to the prospects of the claim succeeding, but also the claim and response forms, the "Further and Better Particulars" which the claimant had submitted, the responses from the respondent's solicitor and the relevant e-mail correspondence on file.

Summary of claimant's submissions

7. By e-mail dated 15 July 2019, the claimant provided Further and Better Particulars of his first claim.

Direct discrimination

8. In support of his complaint of direct discrimination, he referred to: ***Showboat Entertainment Centre Ltd v Owens*** [1984] ICR 65.

9. He claimed that he was, *"unlawfully suspended by the respondent under their disciplinary procedures"*, *and* that this was, *"because of my known friendship with Mr G Reid who has a protected characteristic".*

10. Mr Reid had raised an Employment Tribunal claim against the respondent in which he alleged that a Manager, Bob Wilson, had discriminated against him on the grounds of his race. There was an extra-judicial settlement of the claim in June 2018. The claimant alleged that he had been unlawfully suspended by Mr Wilson from 13 February 2019 until 9 March 2019, *"over a very minor incident".* He

alleged that his friendship with Mr Reid was well known and that it was because of his *"association with Mr Reid"* that he was subjected to this detriment.

11. The claimant raised a grievance and in his submissions he produced an extract from the respondent's investigation report dated 21 March 2019:-

> *"**Allegations and Findings***
>
> *1. The process of your suspension/investigation starting on 15/02/19 not being fair and balanced.*
>
> ***Finding***
>
> *The incident in which you swore during a conversation with …. on 13/02/19 could have been dealt with informally on the same night in which the incident happened and is sated per the initial investigation.*
> *The incident could also have been dealt with without you being suspended.*
> *As discussed during your grievance hearing, you should never have received a copy of the initial grievance against you or a copy of the investigation, especially not redacted. I believe this has been the cause of many of your concerns against the process and how it has been handled. However you should never have had access to this information due to General Data Protection Regulation (GDPR)."*

12. The claimant also identified a comparator namely, *"Anton Korolov who, threatened to punch Stefan Roberts in the face on the shop floor, and which many members of night staff and Managers are fully aware of. This was dealt with informally with no suspension and is a far more serious threatening act than I was (ALLEGED to have made which was never proven). Both members of staff are still working at Tesco Lerwick. I say I was treated differently and unlawfully suspended and put through an unjust disciplinary process because of my association and close friendship with Mr G Reid, as Mr Korolov is not friends with Mr G Reid he gets no suspension or discipline but I do".*

Victimisation

13. The claimant maintained that he had been victimised, "*because my named colleague Mr G Reid whom I am associated with brought proceedings under the Equality Act 2010; and because of my close friendship and association with him*".

14. He claimed that the detriment to which he was subjected was his, *"unlawful suspension".*

15. In his subsequent claim (Case Number 4110429/19) he also brought a complaint of victimisation on the same basis. He claimed that:-

> *"This new claim relates to two further acts of detriment which amounts to further acts of associative discrimination, harassment & victimisation. In summary of the two further acts of detriment; the first relates to a second grievance which was conducted contrariwise to Tesco's own grievance policy & procedures. I had to wait three weeks for my second grievance to be heard, this is highly irregular and forms part of a consistent pattern of less favourable treatment in comparison to my other colleagues at work. To date, six weeks later I am still waiting for the outcome meeting of the second grievance to take place. This is so blatantly subversive and unfair to the grievance process. The second act of detriment relates to yet another instance of my being harassed and victimised during my break; this time by both George Low and Magnus Sinclair. This is almost a carbon copy of less favourable treatment I have received in the recent past which I have raised in my ET claim stated above. On this occasion, Thursday 22 August 2019 I was taking my 45 minutes meal break some time between 2am and 3am in the canteen alone, when I was unexpectedly confronted in an intimidating way by the Night Managers George Low and Magnus Sinclair. They demanded I speak to them in the office about my going home early after I had finished my work. This confrontation was totally unnecessary and provocative because my leaving early had been sanctioned by my line manager Abby".*

Harassment

16. Although apparently this complaint was not advanced in either the claim form or the claimant's Further and Better Particulars which he submitted on 15 July, in his e-mail of 30 July he advised that this was a complaint he wished to pursue. He referred to the details of this complaint which he had provided in an attachment to

his Agenda for the preliminary hearing to consider case management which I conducted on 10 July 2019 (my Note refers).

17. He made the following allegations:-

> *"In January 2019 I was subjected to disproportionate and unreasonable questions about the length of my breaks. I was accused of taking more time than I actually did.*
>
> *My toilet breaks were observed and timed. My other colleagues were never, ever subjected to this treatment. This also bears a lot of similarities with my friend and colleague who suffered from this kind of unwanted and unjustified scrutiny. I say that my treatment stated is because of my friendship and close association with my colleague who has a protected characteristic, namely that of race.*
>
> *This conduct most definitely violated my dignity because I was always worrying about my being timed using the toilet. I even contemplated not going to the toilet when I needed to. I felt humiliated and belittled by this treatment. No other staff were being treated in this way. My treatment in this whole process has been such that I am now currently undergoing counselling because of the anxiety and stress this treatment has caused me. I am currently receiving support from an occupational health counsellor and this has been ongoing since my request for support in late April 2019".*

18. He also brought a complaint of harassment in the subsequent claim, based on the averments which I have detailed above.

19. Further, in his e-mail of 18 October 2019 the claimant made the following allegations regarding the second claim:-

> *"In regard to this case i would like to say that, even though I had performed a protected act (submitting an ET1) and taken the route of Tribunal over my less favourable treatment, i am still being Victimised and Harassed, which has led me to raise another formal grievance at my place of work. My first complaint is that Gordon Wilson was appointed as the manager dealing with my Grievance. i say that Gordon Wilson should never of (sic) been appointed to hear my Grievance as he was a person named in my initial ET1 claim. The second is that i had to wait 3 and a half weeks for this grievance to be heard which is in breach of Tesco's own policy, the excuse i received was that Gordon Wilson was busy and i had holiday commitments. Gordon Wilson had 4 days Before my Holiday*

to hear the initial Grievance which he did not do, his excuse for this in my outcome meeting, was this and i quote "i could not find a note taker". It is complete nonsense as there are 7 other managers in my store that could of (sic) been note taker. My argument is that someone raises a grievance against me and it is dealt with the next working shift and i am subsequently suspended but i raise a grievance against management stating that i feel victimised and threatened by these managers and i have to wait 3 and a half weeks just to get my initial grievance heard. This is less favourable treatment than my colleagues.

On the 21st August at approx 3am i was on my official break sitting in the canteen, When i looked up i had George Low and Magnus Sinclair (Night Manager) standing over me. i took my headphones off and George said "You need to come to the office". Firstly why am i being confronted on my Breaks, Unless it's for a fire alarm or something serious they have no right to be interrupting my un-paid break. i asked what i had to go to the office for and George replied your break times and going home early. i said that i wanted to have a formal meeting with a rep present as the last time i was confronted in such a way it was to be told i was suspended, to which George replied "So you want to do it that way do you" to which i replied yes. i explained that i didn't feel comfortable with this and i subsequently left the store feeling very intimidated and frustrated. The first point about going home early, i have discussed this with my line manager Abby McDougall that if the workload is light i will go home when i finish my tasks as i did not wish to work with the night management at that time because of them making me feel intimidated, uncomfortable and anxious. My line manager said she had no problem with this as long as it didn't affect me too much financially. This in my opinion is sanctioned as she had every chance to say i could not do that. The second point is about my Break times. i have a referral statement which states and I quote "If Ben feels intimidated, anxious or generally uncomfortable at work he is to come away from the shop floor for a break until he feels more comfortable and can return to work". Now I was not on any break other than my official break, So please can the respondent answer as to why i am being confronted in an intimidating way by not one but two managers whilst on my un-paid break, This is another instance of less favourable treatment than my colleagues. i say all of this stems from me submitting my first grievance against my treatment and subsequent ET1, i have noticed that other managers are now not speaking to me the same as before, i was also promised by store manager Ryan McLean that i would get a written apology from him about my treatment which i have not received. It is my belief this is because I took the route of tribunal".

Summary of respondent's submissions

Direct discrimination

20. The respondent's solicitor claimed that the complaint of direct discrimination had *"no reasonable prospect of success".* She maintained that at the relevant time the Manager who suspended the claimant was not aware of his friendship with Mr Reid. *"The claimant was suspended due to his actions of swearing at another colleague in front of customers and making that colleague feel uncomfortable and intimidated in the work place".*

21. She further submitted that:-

> *"The claimant has provided no evidence to show that Mr Wilson (the Manager who suspended him) was aware of the claimant's close friendship with Mr Reid. The claimant has alleged that another Manager, Mr Howells (who no longer works for the respondent) was made aware of his friendship but the claimant has not demonstrated that the Night Managers named and the claimant's claim and in particular, Mr Wilson) were aware of the claimant's and Mr Reid's friendship at the time of the claimant's suspension."*

22. She claimed that the circumstances relating to the two named comparators were materially different.

23. She also submitted that the claimant, *"had failed to demonstrate a causal link between its friendship with Mr Reid and his alleged detriment or provide any evidence to support this".*

Victimisation

24. This complaint was also denied by the respondent. The respondent's solicitor submitted that a claim of victimisation by association was not competent as, *"the wording of s.27(1) does not make reference to a protected act carried out by another individual".*

25. She made the following submissions:-

> *"In respect of the claimant's victimisation claim, the claimant identifies the "protected act" as being the Tribunal proceedings brought by Mr G Reid against the respondent. However, as noted at the preliminary hearing, this "protected act" was not performed by the claimant himself. It is the respondent's position that a claim of victimisation by association is not a competent claim and that the Tribunal therefore does not have jurisdiction to hear this claim.*
>
> *The claimant also makes reference in his further and better particulars to any future acts of victimisation which may occur as a result of the claimant bringing his current claim against the respondent, which the Tribunal should consider. It is the respondent's position that the claimant can only bring a claim in relation to acts of victimisation that have actually occurred and cannot claim victimisation in relation to acts that could potentially occur in the future".*

Harassment

26. The respondent's solicitor submitted that this complaint had not been advanced either in the claim form or in the claimant's Further and Better Particulars which he submitted by e-mail on 15 July.

27. However, as I recorded above, the claimant's position was that he had set out his harassment complaint in the Schedule to his Agenda for the case management preliminary hearing.

28. She also objected to the inclusion of facts relating to *"rest breaks"* as these were not pleaded in the claim form.

29. The claimant's response was that he was, *"harassed and threatened with suspension by George Low/Night Manager two weeks prior to my unlawful suspension of which George Low/Night Manager was a part of, he was also taking part in talking about my unlawful suspension the night before I was unlawfully suspended. He had a part in my unlawful suspension and threatened to suspend*

me two weeks prior, I also add that George Low/Night Manager was the Manager who unlawfully suspended my colleague and close friend Mr G Reid".

30. The respondent's solicitor also drew to my attention that the claimant had advised in his e-mail of 30 July 2019, *"I am also able to provide evidence in detail that I could only provide in a full statement not an ET1 application. My understanding of the ET1 application is that an initial account of events are provided at this stage, and Further and Better Particulars are provided subsequently".*

31. The respondent's solicitor disagreed. She referred to ***Chandok v Tirky*** [2015] IRLR 192 and the following passage, that the ET claim form:-*"Is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but unnecessary function. It sets out the essential case. It sets out the essential case. It is that to which a respondent is required to respond"* (paragraph 16). In any event, she submitted the additional allegations are denied.

32. So far as the subsequent claim was concerned, the allegations of harassment were denied. The respondent's solicitor also denied that:- *"Having regard to all the circumstances, including the perception of the claimant, any conduct of the respondent could reasonably be considered as having the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant".*

Discussion and Decision

Burden of Proof

33. Each of the discrimination complaints requires a claimant first to establish facts that amount to a *prima facie* case. S.136 of the Equality Act 2010 ("the 2010 Act") provides that, once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation.

34. ***Igen Ltd v Wong*** [2005] IRLR 258 remains one of the leading cases in this area. In that case the Court of Appeal established that the correct approach for an Employment Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the Tribunal could infer the discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove – again on the balance of probabilities – that the treatment in question was "*in no sense whatsoever*" on the protected ground.

35. The Court of Appeal in ***Igen*** explicitly endorsed guidelines previously set down by the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205. Although these cases concerned the application of s.63A of the Sex Discrimination Act 1976, the guidelines are equally applicable to complaints of race discrimination. Indeed, they apply to all other forms of discrimination. They can be summarised as follows: -

- It is for the claimant to prove, on the balance of probabilities, facts from which the Employment Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.

- In deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that "he or she would not have fitted in".

- The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

- The Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination - it merely has to decide what inferences could be drawn.

- In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

- Those inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information.

- Inferences may also be drawn from any failure to comply with a relevant Code of Practice.

- When the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent.

- It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

- To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.

- Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment.

- Since the respondent would generally be in possession of the facts necessary to provide an explanation, the Tribunal would normally expect cogent evidence to discharge that burden – in particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

36. Further, in ***Bahl v The Law Society and others*** [2004] IRLR 799, the Court of Appeal upheld the reasoning of the EAT and emphasised that unreasonable treatment of a claimant cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof, the principal is still valid. In other words, unreasonable treatment is not sufficient in itself to raise a *prima facie* case requiring an answer. As the EAT said in ***Bahl*** at para 89: *"… merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct".*

37. In the recent case, ***Chief Constable of Kent Constabulary v Bowler*** UKEAT/0214/16/RN, the EAT held that the incompetent handling of a grievance and a lackadaisical attitude of the investigator was insufficient to give rise to an inference of discrimination. The EAT also reiterated the caution expressed in ***Igen*** against too readily inferring discrimination, merely from unreasonable conduct where there is no evidence of other discriminatory behaviour.

38. The guidelines in ***Barton*** and other cases clearly require the claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer.

39. That point was further emphasised by LJ Mummery giving the judgment of the Court of Appeal in ***Madarassy v Nomura International plc*** [2007] IRLR 246:

> *"For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination, nothing more. So the bare facts of a difference in his status and a difference in treatment – for example, in a direct discrimination claim evidence that a female claimant had been treated less favourably than a male comparator – would not be sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of".*

40. For the purposes of determining the issues with which I was concerned in the present case, I took the claimant's averments in his claim form and other relevant documentation at their highest value. In other words, I proceeded on the basis that the claimant would be able to prove all the facts he avers. He is required to: "*set out with the utmost clarity the primary facts on which an inference of discrimination is drawn*"; and: "*it is the act complained of and no other that the Tribunal must consider and rule upon*" (***Bahl***). However, I remained mindful that the claimant is unrepresented and has no experience of employment tribunal proceedings.

41. I deal with each of the discrimination complaints in turn.

Direct Discrimination

42. S.13 of the 2010 Act is in the following terms:-

> *"**13 Direct Discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

43. Although the two-stage shifting burden of proof applies to all other forms of discrimination and in particular, so far as the present case is concerned to harassment under s.26 and victimisation under s.27, shifting the burden of proof probably has the greatest impact in complaints of direct discrimination, where it is necessary to establish that the claimant has been treated less favourably than another because of a protected characteristic.

Direct Discrimination Complaint

44. The respondent maintains that its management was not aware of the claimant's friendship with Mr Reid. However, this is strongly disputed by the claimant. This conflict can only be properly determined by hearing evidence.

45. So, what of the prospects of this complaint succeeding? Even taking the claimant's averments at their highest value, does this complaint have a reasonable prospect of success?

46. When considering this issue I was mindful not only that the claimant was unrepresented, but also of what Lord Steyn said in ***Anyanwu v Southbank Students Union & others*** [2001] ICR 391, HL, that as discrimination cases tend to be *"fact sensitive"* strike out should only be ordered, *"in the most obvious and clearest cases"*. Lord Hope also said in that case that *"discrimination issues … should, as a general rule, be decided only after hearing the evidence"*.

47. However, establishing a *prima facie* case was more challenging for the claimant in the present case as he did not possess the "*protected characteristic*" of *"race"* himself. The complaint was one of direct discrimination *"by association*".

48. So far as the alleged detriment, namely the claimant's suspension was concerned, it was not *"unlawful"* as the claimant alleged. The respondent only decided that the "incident" *could* have been dealt with informally on the same night without the claimant being suspended. The claimant was suspended on full pay and it was not disputed that the claimant's colleague had complained about him and raised a grievance. He alleged that the claimant swore at him at work in the store. The claimant accepted himself that he swore *"under his breath".* Although the respondent could have dealt with the matter in a different way, it had to address the grievance by the claimant's colleague.

49. Even taking the claimant's averments at their highest value, I had serious concerns as to whether he would be able to establish a *prima facie* case, as he had to do. I was concerned whether the claimant would be able to establish a link between the way he alleged he was treated and his "association" with Mr Reid; I was concerned that the claimant would be able to prove that his treatment amounted to a detriment.

50. While his friend and colleague, Mr Reid, had brought a Tribunal claim, it had settled "out of court" several months before the claimant's alleged detriment.

51. In my e-mail of 2 September 2019, I asked the claimant, amongst other things, the following question:-

> *"In terms of the burden of proof provisions, the claimant has to establish a causal connection (a link) between his suspension and his 'association' with Mr Reid. On what basis does he allege such a connection? What evidence can he lead in this regard".*

52. Although the claimant replied, at some length, by e-mail on 8 September, I was not satisfied that he had adequately answered my question.

53. The respondent's solicitor also maintained, consistently, that the claimant had, *"failed to demonstrate a causal link between his friendship with Mr Reid and his alleged detriment or provide any evidence to support this".* In my view, there was some force in this submission in relation to all three discrimination complaints which the claimant advanced.

54. So far as the direct discrimination complaint was concerned, the claimant had identified a comparator namely, Anton Korolov who he alleged had threatened to punch a colleague on the shop floor. He alleged that he was *"treated differently"*; he was not, *"unlawfully suspended and put through an unjust disciplinary process".* It was not clear whether the circumstances of that incident were truly comparable but that was a matter for evidence.

55. Even if the claimant was friendly with Mr Reid and the friendship was well-known to the respondent's Managers, having regard to the guidance in ***Bahl*** and ***Madarassy***, it appeared that all that he was alleging was unreasonable treatment. There was little by way of averments which might establish a causal link between his friendship with Mr Reid and the detriments. It was not clear how he was going to prove that he had been treated in the way he alleged, *"because of"* his *"association"* with Mr Reid.

56. However, bearing in mind the guidance from the House of Lords in ***Anyanwu*** and the caution which must be exercised in striking out discrimination claims, I arrived at the view, albeit with some hesitation, that this complaint has, *"little reasonable prospect of success*", rather than *"no reasonable prospect".*

57. I decided, therefore, that the claimant should be required to pay a deposit in terms of Rule 39(1) as a condition of continuing with this complaint.

58. In terms of Rule 39(2), *"The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit".*

59. Accordingly, I direct the claimant, within the next 7 days, to provide details to the Tribunal of his financial circumstances, including his monthly income and expenditure and his capital, including savings, to enable the amount of the deposit to be considered.

Costs

60. It is also necessary to draw to the claimant's attention the potential costs implications for him should he decide to pay the deposit and proceed with this complaint, in terms of Rule 39(5).

Victimisation

61. S.27 of the 2010 Act is in the following terms:-

> ***"27 Victimisation***
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act –*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not expressed) that A or another person has contravened this Act*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

> *(4) This section applies only where the person subjected to a detriment is an individual.*
>
> (5) *The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule".*

62. The protected act relied on by the claimant was in terms of s.27(2)(a). His colleague and friend Mr Green had brought Employment Tribunal proceedings against the respondent. There was an extra-judicial settlement in June 2018.

Competency

63. I first considered whether "victimisation by association" was a competent claim as the "protected act" was not carried out by the claimant himself.

64. The wording of s.27 would appear to suggest that it is confined to those who have themselves done a protected act. The section's wording is not wide enough, it would appear, to cover an individual who claims to have suffered a detriment because someone else has done it. Nevertheless, in ***Thompson v London Central Bus Co Ltd*** ET Case No. 2300125/14 an Employment Tribunal held that victimisation "by association" is covered by the 2010 Act.

65. A different Tribunal went on to strike out the claim on the basis that the claimant had failed to establish the necessary "association" in order to pursue such a claim, but that decision was overturned on appeal in ***Thompson v London Central Bus Co Ltd*** [2016] IRLR 9. However, there was no appeal against the first Tribunal's finding that victimisation occurs *"because of a protected act"*, regardless of who does that act.

66. I referred that case to the parties and invited submissions as to the competency of the complaint. The respondent's solicitor made the following submissions:-

> *"It is the respondent's position that while the Employment Appeal Tribunal case of **Thompson** concerned a claim of victimisation by association, the EAT did not expressly consider whether a claim of victimisation by association could be brought under s.27. It is therefore the respondent's position that this case is not determinative on the issue.*

> *The case concerns the appeal of a strike out decision made by the Employment Tribunal and the EAT confirmed at the outset that it was not in dispute as part of the appeal whether there could in principle be a claim of associated discrimination. A later EAT case of* ***Jamu v Asda Stores Ltd & Ors*** *UKEAT/0221/15/DA held the following:-*
>
> > *'The claimant was not saying he was victimised because he was associated with someone else who had performed a protected act. Had that been his complaint, an issue would certainly have arisen as to whether that was a permissible cause of action given the wording of section 27. It was a cause of action assumed in* ***Thompson*** *but there is no decision on the question. It is properly to be described as a moot point'. (Paragraph 46)*
>
> *It is accordingly the respondent's position that there is no binding authority which confirms that a claim of associative discrimination is competent*

67. The respondent's solicitor also submitted that, *"the natural reading of s.27(1) does not allow for associative discrimination";* the wording of s.27(1), *"does not make reference to a protected act carried out by another individual".*

68. I decided that the submissions by the respondent's solicitor were well founded. I accepted that there is no binding authority that the claim of victimisation by association is competent.

69. The decision in ***Thompson*** has to be treated with some caution. The statutory construction give by the Employment Tribunal was not subject to appeal and was not discussed, therefore, by Judge Richardson at the EAT.

70. In my view, giving the wording of s.27 its ordinary meaning, it is only the person who does the protected act who enjoys the protection of the section, if he or she is personally subjected to a detriment.

71. I decided, therefore, that this complaint is not competent, and should be dismissed as the tribunal does not have jurisdiction.

72. Further, even if such a complaint is competent, and even taking the claimant's averments at their highest, I was not satisfied that this complaint has a reasonable prospect of success.

73. All that the claimant alleges is that Mr Reid raised an Employment Tribunal claim, that he is a friend and colleague and that he was subjected to a detriment, nothing more.

74. The detriments alleged, namely his suspension and in the more recent claim, as I understand it, the respondent not following its own grievance policy and procedures and Managers "confronting" the claimant about going home early, occurred long after Mr Green commenced Employment Tribunal proceedings and the settlement in June 2018.

75. Although the EHRC Employment Code confirms that there is no time limit within which victimisation must occur after a person has done a protected act, as a general rule the longer the period between the protected act and the detriment the harder it's likely to be to show a nexus between the two, particularly where the employment relationship is ongoing.

76. I was not persuaded, therefore, having regard to the guidance in such cases as ***Bahl*** and ***Madarassy***, that the claimant could establish a *prima facie* case and discharge that burden. I was not satisfied that there was any reasonable prospect of the claimant being able to establish that he was subjected to a detriment because, his colleague and friend Mr Reid had done a protected act.

77. Even if this claim is competent, therefore, I would have struck it out on the ground that it has no reasonable prospect of success in terms of Rule 37(1)(a).

Harassment

78. S.26(1) of the 2010 Act is in the following terms:-

> "***26 Harassment***
>
> *(1) A person (A) harasses another (B) if -*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of -*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

79. Unlike the complaint of victimisation by association, I was satisfied that harassment by association is a competent claim. It is clear that harassment may be claimed where the unwanted conduct is based on the protected characteristic of another person. This was the case in ***EBR Attridge LLP (formerly Attridge Law) and anor v Coleman*** [2010] ICR 242. The EHRC Employment Code also gives a number of examples of this kind of harassment.

80. Some of the claimant's averments in support of this complaint were not in the claim form but were in his Agenda for a case management preliminary hearing. The claimant is not represented and has no experience of employment tribunal proceedings, the Agenda had been copied to the respondent's solicitor and I was satisfied that the respondent's solicitor had been given fair notice of the basis for this complaint. However, even taking the claimant's averments at their highest, it was not clear that the alleged detriments would satisfy the definition in s.26.

81. For the same reasons which I have given above in relation to the complaint of direct discrimination by association, I had serious reservations as to whether the

claimant would be able to establish a causal link between his friendship with Mr Reid and the alleged harassment.

82. Nevertheless, having regard to the guidance in the case law in such cases as ***Anyanwu*** and the *"fact sensitive"* nature of discrimination complaints, I decided, albeit again with some hesitation, that rather than striking out the complaint on the basis that it has *"no reasonable prospect of success"*, that it has *"little reasonable prospect of success"* and that the claimant should be ordered to pay a deposit as a condition of continuing with the complaint.

83. I have already directed the claimant to provide details of his financial circumstances so that an appropriate amount can be determined. As soon as this information is to hand, I shall issue an Order with the amount of deposit the claimant will have to pay.

Further procedure

84. Should the claimant decide to pay the deposits and proceed with claim, it will be helpful, particularly as the claimant is unrepresented, to have another preliminary hearing to consider case management, further procedure and appropriate Orders.

Employment Judge: **Nicol Hosie**
Date of Judgment: **30 October 2019**
Date sent to parties: **31 October 2019**