



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4106823/19**

**Held on 26 November 2019**

**Employment Judge N M Hosie**

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**Mr S Fenton**

**Claimant  
In Person**

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**Babcock Communications Limited**

**Respondent  
Represented by  
Ms S James,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the complaint of direct discrimination is struck out as having no reasonable prospect of success.

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**REASONS**

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1. I issued an oral Judgment with reasons, at a preliminary hearing which was held on 11 September 2019. I struck out or dismissed a number of the complaints, leaving only complaints of direct discrimination and “breach of contract/wrongful dismissal”.

2. On 17 September and 16 October 2019, I issued written Judgments by way of confirmation. I also issued an explanatory “Note for Parties” on 17

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September. In that Note I invited the parties to make written submissions with regard to the direct discrimination complaint. These are now to hand.

3. I have also received from the claimant copies of documentation relating to the disciplinary action which was taken by the respondent and which led to his dismissal.
4. As I recorded in my Note, the claimant relies on CT as his comparator. CT is homosexual. The claimant is heterosexual. The respondent's solicitor accepts that the Tribunal has jurisdiction to hear a complaint of direct discrimination on the basis that the claimant is a heterosexual individual and he is using a homosexual individual as a comparator. However, the respondent's solicitor maintains that CT is not an appropriate comparator.
5. The claimant maintains that he was disciplined for making a mobile telephone call from a "secure building", contrary to the respondent's Policies and Procedures. However, CT took his call in an office which is also a "secure building" and yet CT was not disciplined.
6. The respondent's solicitor maintained that CT was not an appropriate comparator as the claimant was not disciplined for a breach of the respondent's mobile telephone policy, but rather because he made a video call of a colleague getting changed for the purpose of embarrassing another colleague. However, CT did not make such a video call.
7. It is clear from the copy documentation which I received from the claimant that he was indeed disciplined not for breaching the respondent's mobile telephone policy, but rather because he *"made a face-time call to CT which showed your colleague FM changing into his overalls, with the intention of embarrassing your colleagues. It is also alleged that on Friday 30 November 2018, you informed your colleagues of the face-time call, causing further embarrassment to your colleagues."*

8. S.23(1) of the Equality Act 2010 provides that on a comparison for the purpose of establishing direct discrimination there must be, *“no material difference between the circumstances relating to each case”*. In the leading case of ***Shamoon v. Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337, Lord Scott explained that this means that, *“the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position **in all material respects** (my emphasis) as the victim save only that he, or she, is not a member of the protected class.”*
9. I arrived at the view, therefore, that the respondent’s submissions were well-founded and that the claimant had failed to identify a suitable comparator.
10. I concluded that this complaint has, *“no reasonable prospect of success”*. It is struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

#### Further procedure

11. The only complaint which is going ahead, therefore, is the complaint of “breach of contract/wrongful dismissal”. The issue is whether or not the claimant was guilty of gross misconduct which entitled the respondent to terminate his contract before its expiry.

**Employment Judge:** Nicol Hosie  
**Date of Judgment:** 04 December 2019  
**Date sent to parties:** 05 December 2019