



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Nos: 4111275/2019 and 4111276/2019

Preliminary Hearing held at Dundee on 4 February 2020

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Employment Judge I McFatridge

Mr D Drennan

**Claimant
In person**

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Jamie Arthur

**First Respondent
Represented by
Mr Rollinson,
Solicitor**

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25 **Frances Bowie**

**Second Respondent
Represented by
Mr Rollinson,
Solicitor**

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Lumiradx Technology Ltd

**Third Respondent
Represented by
Mr Rollinson,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(One) The further and better particulars lodged by the claimant following the preliminary hearing on 13 December are accepted.

E.T. Z4 (WR)

(Two) The respondents' application to strike out the claims does not succeed.

(Three) The respondents' application for a deposit order in respect of the claim of direct sex discrimination and harassment by Jamie Arthur succeeds (order attached).

5 (Four) The respondents' application for a deposit order in respect of the allegation of direct sex discrimination and harassment by the company relating to the actions of Jibril Mohammed succeeds (order attached).

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REASONS

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1. The claimant submitted two claims to the Tribunal which were subsequently conjoined. He claims that he was automatically unfairly dismissed and also claims sex and race discrimination. The respondents submitted a response in which they denied the claims. They also indicated that they required further particulars of the claim before they were in a position to deal with them. A preliminary hearing was held on 13 December 2019 and following this the claimant was ordered to provide further and better particulars of his claims. The claimant duly did so and on 28 January 2020 the respondents wrote to the Tribunal indicating that they were seeking an order that the claims be struck out either in whole or in part. If the Tribunal was not with them on that then they sought a Deposit Order in respect of the claims. The respondents' representative also made the point that his view was that a number of the allegations in the further and better particulars were in fact new allegations and amounted to amendment. I indicated that I would only be prepared to hear the strikeout if the parties were clear as to what the claims before the tribunal were. I would not be prepared to consider whether or not to strike out a claim before I had decided whether or not the claim was properly before the tribunal. I therefore indicated that if the Respondent considered that parts of the further particulars amounted to an amendment of the claim which should not be accepted then he should raise this during his submissions and I would rule on this prior to making my decision on strike out. Thereafter both parties made submissions. I summarise these below.

Once I had heard from both parties I indicated that I would reserve judgment. Accordingly, the case management preliminary hearing which was due to take place on the same date did not happen. I have therefore dealt with further procedure at the end of this judgment.

- 5 2. The claimant's further particulars set out six distinct claims together with background in 20 numbered paragraphs. I shall deal with each of the claims in turn.

Direct sex discrimination and harassment by Jamie Arthur – sections 13 and 26 Equality Act 2010

- 10 3. The respondents' position was that in relation to this claim the claimant had set out a number of personal difficulties he had had in his relationship with Jamie Arthur however it was the respondents' position that there was nothing in what was alleged to suggest that Jamie Arthur treated the claimant less favourably than anyone else nor that such alleged treatment
15 was connected to his sex. The respondents accepted that the claimant appeared to have a relationship problem with Ms Arthur stemming from the incident in late 2018 but considered that even if the claimant's averments were taken at their highest the link with the claimant's sex was unclear. The respondents' position was that it was more likely that any
20 relationship issues were due to the events surrounding the mutual grievances that Ms Arthur and the claimant submitted in January 2019.

4. The claimant's position was that the nature of the remarks which he alleged had been made by Jamie Arthur were such that they were prima facie related to sex. They were personal comments about his physique.
25 It was also his view that Ms Arthur had been responsible for removing personal items from his locker and part of the motivation for this was that the claimant was male. In this connection the claimant referred to his general theme that there had been a hostile environment for him within the company which had been created by members of HR spreading what
30 he described as rumours and allegations that he sexually harassed women. He indicated that this created an atmosphere which meant that people in the company felt that they could abuse him with impunity. He referred to this atmosphere leading to him being dehumanised. I

understood his position to be that the actions of Jamie Arthur required to be seen in that context and that when they were so viewed then their discriminatory nature could clearly be seen

**Direct sex discrimination by the company and Frances Bowie – section 13
5 Equality Act 2010**

5. The respondents' position was that the events narrated in paragraph 6 do not appear in the original claim form. It was the respondents' position that the claimant was expanding on what was a very loosely made claim. In any event the respondents' position was that this was not related to sex.
10 They accepted that the events suggested in paragraph 8 had a loose connection with sex but that there was nothing to suggest the claimant was treated less favourably because he was male. With regard to paragraph 7 the respondents' position was that his sex had nothing to do with the claimant being sent home on 6 June and the company's decision to commence a disciplinary investigation had nothing to do with sex. The
15 respondents referred to the letter sent to the claimant at this point which made it clear that the suspension was in response to the claimant advising that he felt "stressed" and "unsafe at work" and "some people in the company are destroying his wellbeing". The letter was lodged at page 113. The respondents' representative also pointed out that paragraph 9
20 which indicated that sex was a significant factor in the claimant's dismissal was at odds with the claimant's assertion that he was dismissed on the basis that the sole or principal reason for dismissal was that he had made a protected disclosure. The respondents made the general point that in bringing in Frances Bowie and Jamie Arthur as respondents the claimant
25 was behaving vexatiously. He was trying to get one over on Jamie Arthur and Frances Bowie by causing them trouble and inconvenience. The respondents also considered the allegations in paragraph 12 were fanciful. They were no more than the claimant saying that he had made requests which had not been granted.
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6. The claimant's position was that the remark by Vicky Lawson was one which he found extremely hurtful. He averred that members of the respondents including members of their HR department had put together a narrative where the claimant was a predatory male who harassed

women. He referred to statements which had been made to the effect that women were frightened to be in the same room as him. He indicated that during the process he had asked for details of this but it had not been provided. He said that as a result of this narrative there was a culture within the company where he was an easy target and people could say or do things to him with impunity. He saw this as a background to what had transpired around his dismissal. He considered that the remarks made by Frances Bowie would not have been made about a female. It was also his position that in general terms he had been refused a salary increase, promotion and training whereas others including Gabrielle Flynn who was his comparator had been promoted and given pay increases and training. He believed that his manager had been influenced by a perception of him as a predatory male and the resultant belief that he was someone who could readily be dehumanised and treated badly.

15 **Automatic unfair dismissal: section 103A Employment Rights Act 1996**

7. The respondents' position was that the only thing supporting this allegation was that the claimant had told someone that his laptop had been stolen. There was nothing else to suggest that a criminal act had taken place. The respondents pointed to the apparent discrepancy of this claim with the claimant's paragraph 9. The respondents felt that there was no connection between paragraphs 13 and 14. The respondents' representative referred to the letter of dismissal at pages 131-134. He also referred later in his submission to the letter dismissing the appeal. In his view this was a clear case where there was a simple non-discriminatory explanation for the claimant's dismissal which had nothing to do with him having made a protected disclosure.

8. The claimant's position was that it was not disputed he had raised the issue of his laptop having been removed from his locker. It was his position that he had found out within a matter of moments that the person who removed his laptop and had taken other items from his locker was Jamie Arthur. He said that despite this and the respondents' claims to have investigated the matter nothing had happened. He noted that they had started a process of providing him with replacement lab glasses which was one of the items which had gone missing which indicated that in his

view they accepted some responsibility in the matter. He also pointed out that the dismissal letter refers to him for not looking after his laptop. He noted that his laptop had been stored in a locker whilst others kept their laptops on the work surfaces in the laboratory. He also noted that the policy which the respondents referred to in the dismissal letter was a policy relating to mobile equipment which did not in fact cover laptops. His position was that his reporting the laptop stolen and his view that it had been stolen by Jamie Arthur clearly amounted to a protected disclosure. His view was that this taken with the negative attitude against him within the company because of the discriminatory view taken of him by HR had led to his dismissal.

Detriment due to whistleblowing – section 47B Employment Rights Act 1996

9. The respondent's position was that the claimant was clearly sent home for the reasons given in the letter sent to him at the time which were unrelated to any protected disclosure. The claimant's position was that his suspension was related to the protected disclosure which he had made. It would be up to the tribunal to decide on the evidence which explanation was to be believed

20 Direct sex discrimination by Jibril Mohammed

10. Again the respondents' position was that this was not highlighted in the claimant's ET1. It was also not clear how the alleged remarks, even if they were made, related to the claimant's sex.

11. The claimant's position once again was that the nature of the remarks was such that they were related to his male physique. They would not have been made to a woman. He spoke at length of how uncomfortable this made him feel. He described Mr Mohammed as sniggering. He accepted that he had not brought the alleged remarks to the attention of the respondents at any time before the present proceedings. In his view the remarks were an example of the fact that because of the apparent attitude of HR in accusing the claimant of being a male and the rumours which they spread about the claimant, others within the company felt that the

claimant was an easy target and that they could treat him badly with impunity.

Direct race discrimination by Jibril Mohammed

12. The respondents' position was that this was not mentioned in the ET1.
5 The claimant had ticked the box for race discrimination but had only raised this specific matter just prior to the first preliminary hearing. The claimant accepted that this had been an omission on his part. He stated that although he had been in contact with a solicitor at the time he had prepared the ET1 himself in order to save expense. He had only been in
10 contact with his solicitor over the telephone. He subsequently met with his solicitor before providing the further particulars and it was a result of this meeting that the further detail had been included.

Discussion

13. As I advised the parties on the day the first matter which I had to consider
15 was whether I should accept the further and better particulars provided by the claimant and in particular whether I should accept these particulars in circumstances where the respondents indicated that they amounted to an amendment of the claim. I required to do so applying the well-known principles set out in the case of ***Selkent Bus Company Limited v Moore***.

20 14. In general terms I considered that the further and better particulars provided by the claimant were indeed just that. They were further and better particulars of claims which were already made in the ET1. His timing would undoubtedly have been better had the claimant taken proper advice prior to submitting his ET1. I noted that most of the matters now
25 raised by the claimant were foreshadowed in the Agenda for the first preliminary hearing which he submitted. I also note that timescales are tight in employment cases and it is in no way unusual for a discrimination claim to proceed on the basis of initially fairly broad allegations which are later refined through the provision of further and better particulars. I
30 considered that the claimant was certainly entitled to raise the alleged remark of Vicky Lawson as further and better particulars of his claim of sex discrimination. The allegations of sex discrimination by Jibril Mohammed were a new matter. I accepted the claimant saw them as one

more example highlighting what he claimed to be the general atmosphere created by the innuendo and rumours about him which he alleged were spread by the respondents. The precise nature of the racial remarks allegedly made by Gibril Mohammed was also a new matter. All the claimant had done up to this point was check the box on the ET1.

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15. At the end of the day however I considered that the balance of prejudice in this case clearly favoured allowing the further and better particulars to be accepted in full. If they are not accepted the claimant will lose the ability to make claims which he clearly feels strongly about whereas I can see little real prejudice to the respondents if the further and better particulars are allowed. Their only loss is the loss of the windfall benefit of not having to defend claims which would have been in the original ET1 had the claimant taken proper legal advice at that stage. There was no suggestion that the quality of the evidence available had been impacted by any delay.

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16. Having decided that I would allow the further and better particulars in full I then required to consider whether any of the claims should in fact be struck out. I was referred by the respondents to two recent cases *E D and F Man Liquid Products Ltd v Patel and another* [2003] WL 1610284 (in particular paragraph 10) and *Ashok Ahir v British Airways plc* [2017] WL0297886. The latter case includes references to the well-known decisions of the House of Lords in *Anyanwu v South Bank Student Unions* [2001] ICR 391 and *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126. There was reference to the famous speech of Lord Stein at paragraph 24 of *Anyanwu* where he states

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“For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or de-merits of its particular facts is a matter of high public interest.”

There is also reference to the speech of Lord Hope at paragraph 37 who once again confirms that discrimination issues should as a general rule be

decided only after hearing the evidence. The **British Airways** case however goes on to refer again to a later statement of Lord Hope in that judgement (para 39) where he said that he would have held that the claim should be struck out if he had been persuaded that it had no reasonable prospect of succeeding at trial. Lord Hope makes the point that the time and resource of the Employment Tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail.

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17. In the **British Airways** case the EAT looked carefully at the reasons given by the Employment Judge below who had struck out the claim. The EAT state in paragraph 16
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“There is force in Mr Burns's point. Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.”

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It appeared to be common ground between the parties in the British Airways case that the claimant Mr Ahir had falsified his CV. The respondent's position was that that was the non-discriminatory reason for his dismissal. In paragraph 19 the Court of Appeal went on to state

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“However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.”

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18. It therefore appeared to me that in looking at each individual head of claim I required to take on board the clear authority from the higher courts that as a general principle discrimination cases should not be struck out save in the very clearest circumstances. It also appears to me from the **British Airways** case that EAT's guidance is that where there is potentially a non-
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discriminatory explanation which appears to fit all of the accepted facts then I am required to consider whether the claimant's explanation is fanciful or at least place some burden on the claimant to show that matters are not as they would appear to be on the surface.

- 5 19. Applying that in the current case I shall deal with each head of claim in turn.

Direct sex discrimination and harassment by Jamie Arthur

- 10 20. The claimant claims that various remarks were made by Jamie Arthur which he found offensive and he believes that they were made on the grounds that he was male. The respondents, without accepting that the remarks were ever in fact made, indicate that if they were made then this was much more likely to be because of the poor personal relationship between the claimant and Ms Arthur which may have been contributed to by the mutual grievances submitted in January. The claimant's view is that this apparently obvious explanation is not the correct one and that Ms Arthur's behaviour was tainted by sex discrimination. He offers to prove this on the basis of the content of the remarks themselves which he says were related to his male physique and would not have been made to a woman and also the general background of a persecution against him within the company where he says parties spread an innuendo that he was a male who harassed women. I do not feel that, taking the claimant's averments at their highest as I must do I can say that he has no reasonable prospect of success. It is however my view that the claimant has little reasonable prospect of success given the well documented animosity between himself and Ms Arthur. It would therefore be my view that whilst a threshold for a strike out has not been met then the threshold for a Deposit Order in respect of this particular allegation has been met.

- 25 21. I should say for the sake of completeness that I reject the respondents' argument that directing the claim against Ms Arthur is vexatious. The legislation allows for claims against individual respondents. Most respondents will find such claims to be distressing when they are made against them. Apart from the fact of the claimant making the claim I can find nothing to suggest that there was a vexatious element to this.
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Direct sex discrimination by the company and Frances Bowie

22. This relates to the claimant's assertion that the company and Frances Bowie created a situation where there was an innuendo or rumour that the claimant was a male who sexually harassed women. The claimant has listed various detriments including being refused promotion, training etc. He also indicates that this was the background to the events which led up to his dismissal. Whilst there are evidential difficulties which face the claimant this is a case which is stateable and should proceed to a final hearing. I do not consider that the evidential difficulties are such that I can make a finding at this stage that the claimant has little reasonable prospect of success. The claimant refers to calling a witness who attended the hearing with him. It would be pre-empting the evidence if I made any comment on this. Accordingly, I do not consider a Deposit Order to be appropriate.

15 *Automatic unfair dismissal section 103A Employment Rights Act 1996*

23. On the face of it the claimant is saying that he advised the respondent that a crime had been committed – that his laptop had been stolen. I do not believe that I can make a finding that the claimant has little or no chance of demonstrating that if such a report was made this would be a protected disclosure. The claimant states that the sole or principal reason for his dismissal was the fact that he reported his laptop stolen. The respondents' position is that I should have regard to the documentation in the case. I do not consider that I can give much weight to this in the circumstances. It is a well-known fact that employers who discriminate or who dismiss in response to the making of protected disclosures are very unlikely to leave a "smoking gun". In most cases there will be documentation which states that the reason for dismissal was something entirely different. I would distinguish the circumstances in this case from those in the **British Airways** case. In the **British Airways** case there was an acceptance the claimant had been guilty of the misconduct alleged and which the respondents said was the reason for his dismissal. In this case I have to say that the respondents' dismissal letter is not a model of clarity. It does in fact refer to the issue of the missing laptop. It also refers to relationship issues and refers to various comments of the claimant but the claimant's

position was that he made the comments about the respondents which were founded upon because of the way the respondents appeared to be failing to investigate his missing laptop. On one level the claimant is saying that he reported his laptop missing and is then dismissed for not
5 looking after his laptop and for being critical of the respondents for their failure to investigate what happened to the laptop. I cannot say that this claim has no reasonable prospect of success. Again, whilst there are evidential difficulties I do not consider that I can appropriately say that it has little reasonable prospect of success. I am not prepared to make an
10 order in respect of this claim.

Detriment due to whistleblowing

24. The claimant's position is that he was sent home because he made a protected disclosure. The respondents' position is that he was sent home because of comments he had made in an e-mail about feeling stressed
15 and unsafe at work. I observed that the test for detriment is different from the test for dismissal in terms of section 103A. If the claimant demonstrates that he did make a protected disclosure then the Tribunal would require to look at whether this was in any way causative of the decision to suspend. Once again I do not see that I can make a finding
20 that the claimant would have no or little reasonable prospect of success.

Sex discrimination and harassment by the company relating to the actions of Jibril Mohammed

25. I consider that the claimant's arguments in relation to this to the alleged remarks being prima facie sexual harassment are similar to those relating to Jamie Arthur. It appears to me that whatever I decide in relation to this
25 claim, the claimant would be entitled to lead evidence about alleged remarks made by Jibril Mohammed on the basis that these would be evidentiary in relation to the claim of direct sex discrimination by the company and Frances Bowie which I have referred to above. I have
30 considerable doubt as to the likelihood of the claimant being successful in a stand alone claim against the third respondent based on the remarks made by Mr Mohammed. The principal difficulty which the claimant has is that his own position is that he never at any time told the company about

these remarks. It also appears to me that the remarks are even less self evidently sexual than the remarks attributed to Jamie Arthur. I consider that the claimant has little reasonable prospect of succeeding in this claim and accordingly consider that the threshold for a Deposit Order is met. 5 With some reluctance I am not prepared to make a finding to the effect that the claimant has no reasonable prospect of success given what the higher courts have said about the general undesirability of striking out discrimination claims without hearing the evidence.

Direct race discrimination and harassment by the company related to the actions of Jibril Mohammed 10

26. There is no doubt that if the claimant is able to prove that these allegations took place then they would prima facie be capable of amounting to direct race discrimination and/or harassment. The difficulty again is that the claimant does not claim to have brought these remarks to the attention of 15 the respondents at any time prior to his dismissal or indeed at any time prior to the first preliminary hearing in this case. I am certainly not in a position to make a finding that the claimant has no reasonable prospect of success. I consider that the claimant will have some evidential difficulties but given that I have not any information before me in relation to any 20 statutory defence which the third respondent can put forward I do not consider that I can make a Deposit Order in this case.

27. Accordingly, my ruling is that no part of the claims should be struck out. I consider that the threshold for making a Deposit Order is made in respect of claim 1 the direct sex discrimination and harassment claim by Jamie 25 Arthur and claim 5 the direct discrimination and harassment by the company related to the actions of Jibril Mohammed. With regard to the amount of any Deposit Order the claimant advised me that he has not yet been successful in finding other employment. He is in receipt of state benefits of around £600 per month. He does not have any capital or 30 savings. Given his financial circumstances I consider that it is appropriate to make a Deposit Order in the sum of £75 in respect of each of the claims, a total of £150.

28. Finally, I should say that the fact that I have not struck out the claims and have not made a Deposit Order in respect of some of the claims does not in any way imply that I consider any of the claims to be well founded. The claimant should carefully consider in respect of each claim the factual and other matters which he will require to prove in order to succeed and realistically consider whether or not he is in a position to do this. As I have noted above it is only in the clearest of cases that a discrimination claim will be struck out by the Tribunal and the fact that I have not considered this case to be one of those does not in any way convey any view as to the strength or otherwise of the parties' respective positions.

Case management

29. Finally, given that I have not struck out the claim I consider that it would be appropriate to hold a further preliminary hearing for case management purposes. I have made Deposit Orders in respect of part of the claim. I consider that it would be as well to wait until the time period within which the claimant might pay the deposit has elapsed before fixing such a hearing. Accordingly, I will ask the administration to send out a date listing stencil for a case management preliminary hearing to take place no earlier than 17 March 2020.

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30	Employment Judge:	Ian McFatridge
	Date of Judgment:	13 February 2020
	Date sent to parties:	13 February 2020