EMPLOYMENT TRIBUNALS

Claimant: Mr Lalit Mishra

Respondent: Galliford Try Services Limited

AT AN OPEN PRELIMINARY HEARING

Heard: Remotely, in public, via CVP **On:** 9 July 2020

Before: Employment Judge Clark (sitting alone)

Appearances

For the claimant: In person.

For the respondent: Mr Convery, Solicitor

JUDGMENT

1. The claims of sexual orientation discrimination have no reasonable prospect of success and are struck out.

2. The claim of breach of contract is struck out as the tribunal does not have jurisdiction to determine it.

REASONS

Introduction

1) This is a hearing to determine whether the reasonable prospects of success of the claimant's claims falls within either of the tests set out in rules 37 or 39 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That is: -

a) Whether some or all of the claim has **little** reasonable prospect of success, in which case the tribunal may make a deposit order as a condition of that part of the claim being permitted to proceed.
b) Whether some or all of the claim has **no** reasonable prospect of success, in which case the tribunal may strike out that part of the claim.

2) If the prospects of success do not fall within either of these two tests, the claim will proceed to a final hearing in the usual way.

Preliminary issues

3) The respondent has applied for an order under rule 50 for a restricted reporting order or otherwise to anonymise the identity of the individuals involved in the recruitment process, one of whom in particular faces an allegation of sexual misconduct, the other is said to have been aware of it or otherwise bowed to the influence of his colleague's adverse view of the claimant. The restriction sought is to apply to this hearing and in any written record of this hearing. The claimant does not oppose the application. Nevertheless, despite his consent, where there is any restriction to the principles of open justice, the tribunal must satisfy itself that it is in the interest of justice.

4) The nature of the allegation falls short of an allegation of a sexual offence to bring it within section 11 of the Employment Tribunals Act 1996 but I am satisfied that the allegation is at least capable of falling within the term sexual misconduct. However, even if it did not engage with section 11, I am satisfied that rule 50 of the 2013 rules goes further. It enables me to take a balanced approach to the justice of any given situation with particular regard to the justice between the parties in the claim before me and the convention rights of third parties referred to in that claim. All of which must be considered with full weight being given to the principles of open justice.

5) I am satisfied that they engage the convention rights of the two individuals referred to, article 8 in particular, that in exercising the powers of a public body I am obliged to have regard to those convention rights in carrying out my functions. I am satisfied that identifying those individuals would potentially be damaging to them and infringe their article 8 rights. That infringement may be necessary in certain circumstances, in which case not making an order under rule 50, though it would infringe the right, may itself be proportionate. In this case, I am not satisfied it is necessary for their identity to remain public. The dispute between the parties before me can be fairly resolved without needing to identify the two individuals. I have decided that the proportionate order to make is an order anonymising them in any reference or record of this case. There is no loss of quality in the evidence by referring to them as Mr X and Mr Y and doing so is proportionate. In the context of this case, however, it remains appropriate to indicate their gender by use of the title "Mr". They will be therefore be referred to by the parties during this hearing, in my judgment and in any record of these proceedings accordingly.

The claims

6) The claims presented were identified at a previous preliminary hearing as claims of direct discrimination under s.13 of the Equality Act 2010. The protected characteristic relied on is sexual orientation. The detriments alleged to amount to less favourable treatment are: -

a) Not offering Mr Mishra permanent, direct employment but instead offering him an initial 3 month period of contract work.
b) Finding fault with him during the period he worked for the respondent.
c) Terminating his engagement.

7) There is a potential jurisdiction issue going to these allegations. That is whether the claimant brings the allegations under s.39(1)(c) of the Equality Act 2010 as an applicant or employee, having regard to the wider definition of employee found in section 83 of the 2010 Act. Alternatively, whether the second and third allegations are brought under s.41 of the 2010 Act. This is a point that the respondent wishes to argue but because of the way the case has been set down for hearing today, Mr Convery accepts that issue is not before me today. I must therefore proceed on the assumption that there is no jurisdiction issue in the claim, nor is it being considered against the tests in rules 37 or 39.

8) I also note that a question over the breach of contract claim was held over to this hearing although it appeared to have been dealt with all but conclusively at a previous preliminary hearing. The claimant's claim is that he alleges he was entitled to a period of notice upon his contract engagement being terminated on 20 May 2019 (The claim has not been articulated in relation to the earlier offer of employment). The commercial contract governing his contract work which was terminated on 20 May 2019 certainly seems to provide for such a period of notice although it also provides for circumstances when termination can be without notice. The respondent appears to have invoked that insofar as clause 6.3.5 entitles it to terminate where the services are not being provided to the respondent's satisfaction. However, the fatal issue is that it is common ground that the claimant was not an employee and as the jurisdiction conveyed by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is not therefore engaged, the tribunal has no jurisdiction to determine that claim. The County Court would appear to be the appropriate venue. On that basis, that part of the claim will be struck out but in doing so, I record Mr Mishra's wish to pursue that matter in the County Court albeit it appears the claimant in any such claim will then be his limited company, and not him as a natural person.

The substantive test.

9) Whenever considering rules 37 or 39, it is essential to keep in mind the substantive legal test to be applied at any final hearing. In the case of direct discrimination, the relevant provision is: -

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

10) The elements of that provision can be summarised as follows.

a) It is for the claimant to establish on the balance of probabilities the detrimental treatment complained of (s.13 Equality Act 2010).
b) It is for the claimant to establish on the balance of probabilities a difference in treatment compared to either an actual comparator or a hypothetical comparator (s.13 Equality Act 2010).
c) The comparator must be a person whose circumstances are not materially different to the claimant's save that they have a different sexual orientation (s.23 Equality Act 2010). However, the protected characteristic need not be held by the claimant. He may be associated with it or it may be presumed that he has it and, thus, the comparative exercise may need to be modified accordingly.
d) The difference in treatment and difference in characteristic alone not being enough, the claimant must also establish something more from which the tribunal could decide, in the absence of any other explanation, that the protected

characteristic played a part in the treatment complained of. If he does, the legal burden will shift to the respondent to show that the protected characteristic played no part whatsoever in the treatment complained of (s.136 Equality Act 2010, Madarassy v Nomura International Ltd [2007] EWCA Civ 33 at para. 56)

e) That "something more" need not be great (Deman v Commission for Equality and Human Rights, [2011] C.P. Rep. 12)

11) Although it was ruled out at the previous preliminary hearing, the essence of Mr Mishra's claim is that he shunned sexual advances by a member of the interviewing panel and thereafter was subjected to the detriments he alleges. Because I am being asked to make a draconian order against a litigant in person, and notwithstanding what was said at a previous preliminary hearing ruling out this form of prohibited conduct, I have also considered whether the claim could fall within s.26(3) of the Equality Act 2010. That provides that: -

> ***(3) A also harasses B if –***
> ***(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,***
> ***(b) that conduct has the purpose of effect referred to in subsection (1)(b), and***
> ***(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.***

12) The reference to subsection 1(b) is to the proscribed consequences of harassment, namely that which violates "B"'s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for "B'".

13) The essential elements of that type of claim are, therefore: -

a) Unwanted conduct
b) Which is of a sexual nature
c) Which has the purpose or effect of causing the proscribed consequences
d) Which B rejects or submits to
e) And because B rejected or submitted to that conduct he suffers less favourable than had he not rejected or submitted to it

14) The language of the proscribed consequences is deliberate to illustrate the necessary gravity of the purpose of effect to attract legal liability. It is said that not every slip should be elevated to an act of harassment and the gravity of the conduct necessary to amount to harassment set down by parliament should be respected (see for example Richmond Pharmacology v Dhaliwal [2009] ICR 724 and HM Land registry v Grant [2010] IRLR 583).

Applying the substantive test to the relevant rules

15) In any consideration of the tests in rules 37 or 39, the guidance summarised in Mechkarov v Citibank NA UKEAT 0041/16 applies (paragraph 14). The claimant's case is considered at its highest. I make no findings of fact. Where there are material disputes of fact to be resolved, that is likely to be a conclusive reason not to strike out the claim unless the difference between the competing positions is immaterial to the issues in the case or where contemporaneous documentation conclusively shows the contention not to be so. If there is a basis for a case which is more than merely arguable, it should not be struck out. A hearing under rule 39 (or 37) should not be a mini trial of the issues. To be an arguable

case it simply needs to advance an argument that is relevant to advance the substantive issues in the case and which is realistic, as opposed to fanciful.

16) The principles are drawn in part from the high authority relating to strike out of discrimination claims found in Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 (where there is a crucial core of disputed facts in a case it is not susceptible to determination otherwise than by hearing and evaluating the evidence) and Anyanwu v South Bank students Union [2001] UKHL 14 (that in discrimination claims the power to strike out a claim should be exercised in only "the most obvious and plainest cases").

17) Thus, the test is not one of whether the claim is likely to fail or succeed. Claims can appear likely to fail without falling within either test. Illustrating it in lay terms, a 49% chance of success is not enough to make an order on the prospects of success. The prospects must be much lower to amount to little reasonable prospects of success and much lower still to have no reasonable prospect of success. So low that it does not admit any reasonable prospect of succeeding. The test for strike out remains one of carefully analysing the available material and considering whether there is no reasonable prospect of success. It is a high threshold (Balls v Downham Market School [2011] IRLR 217).

18) Conversely, the fact that the tribunal might not make either order should not be taken to be an endorsement that prospects are good or that the claim is likely to succeed.

19) Discrimination claims are often particularly sensitive to a tribunal's findings of fact. Discriminators do not signpost their discriminatory acts and detriments do not come with a label of the discrimination. Proving a case is often done only by the inferences that a claimant can persuade the tribunal to draw. Where there are facts within the claimant's case that could found the basis of such inferences, that too will be a reason not to strike out a claim. But if the case, put at its highest, relies on those inference being drawn, the tribunal's approach to making proper inferences becomes part of the analysis. Inferences are not drawn based on a claimant's mere assertion or belief, they are based on an assessment of the full picture. That will often be invited in respect of an allegation of unreasonable conduct. Unreasonable conduct in itself is not synonymous with discrimination, but is merely a matter of credibility. That means a tribunal must engage with the explanation for any treatment before deciding whether to draw inferences or not. (Bahl v The Law Society [2003] IRLR 640)

The claimant's case

20) I have considered Mr Mishra's ET1 (page 21), his further particulars (page 42) and a document entitled Claimant's witness statement (which has been treated as his written submissions). I have read the hearing bundle containing the contemporaneous correspondence and listened to what both Mr Convery and the claimant have said in their submissions. I have also had regard to the way the case has been advanced at previous telephone hearings, the record of which has been confirmed. At various points I summarised the relevant law for Mr Mishra.

21) The following is either common ground, not disputed or otherwise not contentious.

22) In or around March 2019, the claimant applied for a position with the respondent as a technical support analyst, expert in Oracle software to run its ERP systems. It was a well-paid role advertised at £65-£70,000 per annum. The candidate search was conducted by

an agency, "Square 1 Resources Limited". The claimant has no evidence to gainsay the respondent's position that this was a post it had struggled to fill for some time and it was anxious about the quality and quantity of applicants it had previously attracted. That appears to be consistent with the contemporary correspondence in which the recruitment consultant states was down to the state of the market.

23) Mr Mishra was the only applicant for this post at the material time. He had been unemployed for the previous nine months.

24) There will be no evidence to suggest the respondent generally or, more particularly Mr X, was aware of Mr Mishra's sexual orientation. Mr Mishra accepts he did not complete any monitoring form stating it. Without knowing his sexual orientation either way, he was contacted by the respondent. Mr Y conducted an initial telephone call with him on 24 April 2019. There is nothing to suggest this was based on anything other than what was understood about his skills and experience for the role. Mr Y is a manager of the respondent. During that call, Mr Mishra indicated he had another job offer waiting in the wings and a face to face interview was quickly arranged as a result.

25) That interview took place two days later on 26 April 2019. The panel was made up of Mr Y and a more senior manager, Mr X. Again, there was still nothing which would have disclosed Mr Mishra's sexual orientation in any respect.

26) During the course of the interview, the claimant's case is that Mr X winked at him on two, or possibly three, occasions. On one of those occasions he says Mr X made some hand gesture to Mr Y when he didn't respond to his wink. He has not described the hand gesture anywhere but during the preliminary hearing on 6 March 2020 Mr Mishra expanded to say how Mr X's conduct in the interview was not a problem but that after he failed to respond to the winking, he says Mr X's attitude changed towards him and became negative, indicating that they were concerned that he lacked some of the required skills for the role.

27) It is not agreed that Mr X winked at Mr Mishra, but I take his case at its highest.

28) In seeking to understand Mr Mishra's case, I asked him to describe how he defined his own sexual orientation. Rather unfortunately, he described it initially as being "normal", before then clarifying it as heterosexual. Similarly, Mr Mishra has no knowledge or evidence to adduce of Mr X's sexual orientation. That is, save for is assertion that "he can confirm Mr X is homosexual after meeting him for half an hour because he winked at me". He confidently asserts his conclusion based on the 30 minute interview that he had with him. He then explained to me his thought process on how his claim is to be argued in explicit terms, rather than the inference that the reader is left to imply in his written case. That is, that the purpose of Mr X winking was a form of "come on", to use a colloquialism, to Mr Mishra in front of a junior manager, which is said to be a signal for the fact that Mr X expected sexual favours from Mr Mishra in return for being appointed to the role.

29) Mr Mishra cannot point to an actual comparator. There will be no evidence, from the claimant at least, of other interviews conducted by Mr X before this interview or the experiences of other interviewees. In fact, Mr Mishra can advance no evidence whatsoever about Mr X's conduct or sexual orientation beyond this belief arising from the interview. To establish his case of less favourable treatment, Mr Mishra will rely on a hypothetical

comparator which he constructs in this way. He accepts that the comparator's circumstances must not be materially different to his. That means an applicant with the same level of skills and past experience. He says not only that the comparator's sexual orientation would be homosexual, but that a homosexual hypothetical comparator would have winked back at Mr X and Mr X would have known, or at least thereby presumed, that the sexual favours he is alleged to be seeking would be forthcoming. Because Mr Mishra did not wink back, he will say that he was then subjected to the detriments alleged. In fact, what he actually told me was "I didn't wink back. If I had, probably I would have been treated better". His own doubt expressed in the word "probably" is itself illustrative of the evidence in the case. He says that can be seen in the interview itself because the panel questioned whether he actually had the skills for the vacant role.

30) At the end of the interview he reminded the panel about the other job offer and said he needed to know the outcome quickly. There is no dispute that on 30 April Mr Y sent an email in terms which it is agreed amounted to a job offer as an employee. Mr Mishra accepted the offer and turned down the alternative job offer. The start date suggested at that time was 6 May 2019. This was followed up with an email from the consultant on the same day setting out the terms of the job offer and seeking a response. Mr Mishra sent his passport and visa details to show right to work.

31) Again, there is no dispute that there then followed a number of days during which the parties and a representative of square one resources limited corresponded about the job, the contract, right to work checks and the start date. Typical reference checks were conducted which did not seem to show concerns.

32) During that time, it will be the respondent's case that despite the offer, the reservations Mr X and Mr Y had about Mr Mishra's level of skills led them to explore the options of including a trial period in the job offer. That much is consistent with the contemporaneous correspondence. There is no basis for disputing that their desire to include a trial basis was at this time intended to remain within a contract of employment.

33) There is an email dated 2 May 2019 from Mr X to Mr Y about the trial period. There is a line in it which reads "*we need to make sure that legally we can actually do what we intend to do regarding a trial period*" and goes on to ask a question of the HR adviser if one month, or possibly three months, fixed term was possible because "*we just want to make sure that we know he can do the job*". On the same day they were advised by their internal advisers that a fixed trial period of employment was not available. They appear also to be concerned about the consequences of the rebate levels should the appointment not work out. The rebate levels are the amount of fee to the recruitment consultant they would still be liable for if the appointment ended before certain dates.

34) It follows that there will be no evidence to gainsay the position that the decision on the nature of the engagement (employment or contractor) was not a decision that Mr X himself took. Rather, it was the only route advised by an unconnected third part who had no knowledge of the interview, winking or any party's sexual orientation.

35) On 3 May 2019, the respondent proposed the change to include a trial period by use of a period of contracting on a day rate fee. It was described as a "temp to perm" offer meaning 3 months of contracting after which there was then the move to permanent employment would be considered. The daily charge rate was proposed at £590 but later

became £500. Either way, that is a substantial rate, approximately double the salary that was on offer. Nevertheless, the consultant, no doubt expecting his commission, expressed concern about that and pointed out that if there were performance issues, he could be dismissed in any event. Mr Mishra was also not happy with that change but accepted the revised offer.

36) Delays in conducting the right to work checks in person then followed causing the start date to be put back slightly.

37) On 7 May Mr Mishra entered into a supply contract of services using his pre-existing umbrella company, Indisoft Solutions Limited. It contracted with Square One Resources Limited which in turn contracted with the respondent to provide his services.

38) On Tuesday 14 May 2019 the claimant commenced his role with the respondent under this contracting arrangement. The first day was spent setting up his access and lap-top. On Wednesday 15 May, he had a meeting, began working on some coding and began to experience what he described as difficulties with what he had been given which he says was not his fault. On Thursday 16 May, he met with Mr Y at various times as well as another team member not involved in the appointment process. Mr Mishra will say they started blaming him for nothing. On Friday 17 May, the claimant set about testing the code. He emailed Mr Y to say the steps they had given him to run the code were not working. He was told they were busy. He tried to resolve it himself using what test data he could. He was asked to come into the office on Monday 20 May.

39) On Monday 20 May, Mr Mishra attended the workplace to be told his contract was being terminated. The respondent relied on clause 6.3.5 of the contractor agreement which applies where "the company does not perform the services to the satisfaction of the client".

40) I record that the respondent has a very different take on these four days and it will say how the work done by the claimant and the way he went about doing it showed he was manifestly unsuitable for this level of work. There is correspondence between Mr Y and the other colleague, not Mr X, and the claimant in which their frustration is clearly evident on any assessment.

41) I note also that there is no mention of Mr X in the events occurring whilst Mr Mishra was providing his services which are said to amount to "finding fault" with his work in the second of the detriments. The contemporaneous correspondence shows Mr Y and his colleague in the department being the ones dealing with his work and expressing concern about it. When asked today, Mr Mishra will say that Mr X was a senior manager and therefore he believes it will follow that he was behind this unfair criticism of his work and the decision to terminate his contract. The same can be said for the decision to dismiss which appears from the documentation to be Mr Y's decision. Mr Mishra's case is that he is sure Mr X decided it and not Mr Y.

42) On the day the contract was terminated, the consultant wrote to Mr Y, not Mr X saying "we knew there was a risk but based on his confidence he could do the role we took a punt on him. Unfortunately, it didn't work out. Your luck over the past year is a reflection of the market at the moment so I have attached a CV of a consultant who we know can do the role."

Discussion and Conclusions

43) There is no doubt that the claimant was subject to detriments in the change of contract status he was offered and its termination. So far as there was criticism of his work, that too may amount to a detriment although, of course, it may well be justified. The crux as so often is the case is the reason why those detriments arose.

44) The first question is how will the claimant show he was treated less favourably? Before considering the **reason** for any less favourable treatment, I need to consider how the claimant will establish any difference in treatment at all. It is not for me today to begin to examine too closely what the respondent will say in evidence but it is clear from the claimant's own case that even during the interview there were some reservations expressed that he may not have the necessary skills to perform the role. The contemporaneous evidence seems to support the respondent's contention that that concern not only continued throughout the short period of their relationship but actually materialised, leading to the decision to terminate that relationship but for present purposes I put that to one side and consider the claimant's own case.

45) In order to analyse different treatment as part of less favourable treatment, the legal device deployed in almost all cases is that of the comparator, be it actual or hypothetical. The claimant has no actual comparator. His case has to rely on a hypothetical comparator which necessarily adds another burden as he has to construct the surrounding circumstances to satisfy a tribunal that such a hypothetical comparator would have been treated more favourably. In considering how Mr Mishra says he will seek to construct the circumstances of that hypothetical comparator, the analysis has to engage with the central allegation in this case. The claimant's case is now put explicitly that his refusal to respond positively to the winking, and thereby indicate that he was prepared to perform sexual favours for Mr X, is a material reason for the treatment that he then suffered, treatment which in some if not all cases, he cannot show was the decision of Mr X. He articulates that state of affairs in the context of his claim of sexual orientation discrimination in these terms. His heterosexual sexual orientation, or at least Mr X's perception of it arising from the fact he did not respond positively to his winks, contrasts with the hypothetical comparator whose sexual orientation is homosexual and who therefore would have responded positively to Mr X's winking. It follows that his case is premised on an assertion that the comparator's sexual orientation is synonymous with him responding positively to the alleged sexual "come on" expressed in the winking, signalling his consent to perform future sexual favours for Mr X.

46) I cannot see that that follows. Even aside from the unwarranted stereotyping of gay men as sexually promiscuous, it suggests all gay men would be prepared to effectively prostitute themselves for the sake of a job interview. That is a farfetched foundation on which to base the necessary comparative exercise under s.13. I cannot accept that any tribunal could accept that the hypothetical comparison would be made out. There is no potential basis for assessing the proportion of homosexual men that may or may not have "responded" to the wink. If the necessary positive "response" is not established in the comparison, the subsequent treatment as between the heterosexual claimant and the homosexual comparator is no different. The claimant therefore cannot establish any less favourable treatment because of sexual orientation.

47) Of course, that is of relevance to understanding the basis on which the protected characteristic was relevant to show the necessary less favourable treatment. Beyond that, this case relies on the tribunal accepting that Mr X was only prepared to directly employ someone whose orientation was homosexual, or at least someone who was presumed to be, or otherwise prepared to engage in what Mr Mishra characterises as some form of coded "come on". I simply can't see how any of that follows from the suggestion someone winked and someone else did not wink back (or give some other such indication) during the course of a formal job interview.

48) Even if I move on to the next element of the statutory form of discrimination, I must then consider the prospects of showing the necessary "something more" that is necessary to shift the burden. That does not have to be a great deal but, however low the threshold, there has to be something realistic to engage with.

49) Mr Mishra has no evidence of Mr X's sexual orientation or his sexual activity. He will rely only on his own belief that Mr X is homosexual because he cannot conceive of any other explanation as to why someone would wink. He has no evidence of other candidates for interview. He will have to rely on inference and the question that then arises, is where is that inference to be drawn from?

50) In that regard, Mr Mishra will point to the change of offer and the treatment by the respondent. Unreasonable treatment is of course theoretically capable of providing a basis for an inference being drawn but first the tribunal would have to accept the treatment was unreasonable. Moreover, inferences are not the evidence of a claimant, they are conclusions of fact that a claimant hopes to persuade a tribunal to draw. They come from other points in the evidential landscape and that includes how the tribunal engages with any explanation for the alleged unreasonable treatment said to found the basis for the inference. I am acutely alert to the fact that this analysis appears to engage with findings of fact and I want to stress I am not making findings of fact or conducting a mini trial or seeking to draw, or not draw, my own inferences. I am trying to assess how it could be that the evidence in this case could form the foundation of any inferences necessary for Mr Mishra to have an arguable case. There has to be something more than a mere assertion that a claimant will invite inferences to be drawn. The reasonable prospects of them being drawn is part of the assessment under rules 37/39 just as it is any other evidence.

51) I start by acknowledging the low threshold. In my own experience of hearing these applications, it is not uncommon to be able to identify some basis on which there might be an arguable point that could properly be relied on to support the invitation to the tribunal to draw the necessary inferences. Such a conclusion would take the application out of the test of no reasonable prospect of success, even if it remained within the test for a deposit. But even though that threshold is low, there has to be some reasonable basis on which the tribunal might be invited to draw such inferences. I am not satisfied that Mr Mishra has established that his case, at its highest, has any realistic reference points that could do that. Those that he advances I am satisfied are in the category of being fanciful, which is not enough.

52) That is made all the more difficult for Mr Mishra as any inference based on conduct of the respondent has to engage with the explanation for that conduct advanced by the respondent. Again, this is not me preferring one case over the other, but because Mr Mishra's case is based on inferences being drawn, I have to analyse the approach that a

tribunal is bound to take before drawing such an inference which crucially includes engaging with the explanation for any conduct said to be the foundation of an invitation to draw inferences. In that regard, the contemporaneous documentation appears to show a forceful and consistent argument that is in no way whatsoever related to the protected characteristic. Moreover, there is a contemporaneous paper trail supportive of that position, a position which is itself entirely plausible in this situation. As a result, I simply do not accept any tribunal *could* properly draw the inferences that would be necessary to give Mr Mishra the evidential basis for shifting the burden to the respondent under s.136 of the 2010 Act. Therefore, even if I was wrong to conclude that the claimant cannot reasonably show a difference of treatment and a difference of characteristic, even if he could he would not be able to show the necessary something more to establish the prima facie case.

53) I then take a step back to view the evidential landscape so far as it is agreed, or as the claimant puts it. In many cases, of course, he cannot gainsay what is there to be advanced on the face of the contemporaneous documentation. The following picture emerges:-

a) This is a post that there has been difficulty in recruiting to for some time. Prospective candidates' skills' have been short of what was needed. The market seems to favour contracting to direct employment which on the agreed evidence, appears to command around twice level of the substantial salary on offer.
b) There was doubt about Mr Mishra's skills from the outset as confirmed in the interview itself and in the agency later describing the appointment as "taking a punt".
c) The apparent rejection of the alleged sexual advances was not sufficient to reject his application. He was offered employment.
d) This occurred in the moment of competition with another prospective employer.
e) The respondent's continuing internal debate about his skill level is evidenced in documents immediately after the interview.
f) Mr X and Mr Y's desire to apply a trial period was not intended to change the status of the offer from that of a direct employee.
g) The change of contract status is documented as originating in the HR practices, not Mr X's choice.
h) That the respondent still did engage the claimant. This is a particularly weighting factor. If there was the adverse view of him influenced by a presumption of his heterosexual orientation, the question arises why appoint him at all?
i) Mr Mishra's case is that the offer was designed to punish him twice as Mr X knew that he would turn down the other job offer he had.
j) That the issues with performance, or at least the respondent's perception of performance and capability, engaged immediately.
k) That the person expressing concern for that performance was Mr Y and not Mr X. There is a further leap necessary for the claimant to show that Mr X was behind this decision and the decision to dismiss.

54) In any event the entire premise of the claim is Mr X winking. I have not seen or heard of any evidence to be adduced by the claimant of the context or surrounding circumstances to give it any particular meaning. Winking does not lead to an inevitable conclusion that Mr X was homosexual, still less trying to engage with Mr Mishra to elicit future sexual favours in return for being appointed. It admits any number of explanations unrelated to

the alleged protected characteristic. There is no basis for understanding why it was only after the third wink that Mr X presumably felt sufficiently affronted by Mr Mishra's lack of engagement and decided to subject him to punishment at that point, the detriment being to offer him a period of contracting.

55) Mr Mishra's claim does not carry reasonable prospect of success when the essential elements are analysed. That only gets worse when one stands back to assess Mr Mishra's prospects of success in context of all the evidence in the round. There is no realistic basis of showing a difference in treatment, a difference in characteristic and the something more to shift the burden to the respondent. There are even difficulties in showing any causal link between Mr X and the detriments themselves although if that were all that was in issue, that would require findings of fact. However, if, as a minimum, the burden does not shift on a prima facie basis, the claim cannot succeed.

56) For completeness I have considered the prospects if the claims are considered as harassment although that is no longer before the tribunal. In that light, the claims are equally problematic to establish. In the first instance, the alleged unwanted conduct is explicitly said to have been not a problem to Mr Mishra. He will not therefore establish the proscribed effect, and for similar reasons there is no basis for him to establish the alternative proscribe purpose in the context of what he says this conduct was intended to bring about. Whilst it is arguable that the alleged conduct could arguably be said to be of a sexual nature, in that respect alone I accept that context is everything and, were the application to be determined on this element alone, I would have ordered that it required findings of fact. Finally, there has to be the necessary causal link between the conduct and the claimant's apparent rejection of it. That faces the same gaps in the essential elements of this form of prohibited conduct as is the case for the causation element of the direct discrimination claim.

Conclusions

57) I have no doubt that this is a weak case and is more likely to fail than succeed but that is not the test. However, I also have no doubt that it properly falls within the test of little reasonable prospect of success and, if nothing else, engages the discretion to consider making a deposit order. In that regard, I have taken reasonable steps to identify Mr Mishra's financial means. He is dependent on state benefits in the region of £400 per month and has no recourse to credit cards which are at their limit. Any deposit order would be minimal, if not notional (applying Hemdan v Ishmail [2017] I.C.R. 486). The force of any such order is not the amount of deposit, which should not be set at an unachievable level so as to become a strike out by the back door, but is in the costs order that may follow if the claim proceeds and fails for substantially the same reasons as the deposit was imposed.

58) However, the circumstances of this case are such that I must give serious further consideration to whether its prospects are so poor that it properly falls within the test of no reasonable prospect of success. I am satisfied the claim does fall into that test.

59) For the reasons already given, I am satisfied that, expressed as a claim of harassment, it meets that test simply because the claimant's case at its highest does not establish either the proscribed purpose/intent or effect and will therefore fail even before considering the other elements of section 26(3). As a claim for direct discrimination his

case at its highest will not be able to show that the hypothetical comparator would have been treated any more favourably that he was treated nor, should he get that far, that his sexual orientation was in anyway a material part of the treatment. Mr Mishra simply has not established that his case at its highest has any reference points that could realistically found any adverse inferences. The points that he does advance are fanciful, which is not enough. For all those reasons, I am satisfied that this is one of those very rare cases where the prospects of success is so clear cut that no reasonable tribunal properly directing itself on the law could come to the conclusion that any presumed sexual orientation of the claimant was in anyway whatsoever material to the decisions behind the three detriments alleged.

60) That therefore engages a discretion to strike out the claims. It is not automatic. However, there is nothing put before me to persuade me it would not be in the interest of justice to make that order. Consequently, the claims of discrimination are stuck out.

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Employment Judge Clark

10 July 2020

Sent to the parties on:

15/07/2020…….

For the Tribunal:

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