



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105421/2020 (V)

Held by Cloud Video Platform (CVP) on 12 April 2021

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Employment Judge Eccles

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Mr A Miller

**Claimant
Represented by:
Mrs L Miller – Relative**

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University of Edinburgh

**Respondent
Represented by:
Mr N MacLean -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is to refuse the application by the respondent for strike out of the claim for victimisation under Rule 37(1)(a) of the Rules of Procedure 2013.

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REASONS

BACKGROUND

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1. The claim was presented on 6 October 2020 for unfair dismissal, victimisation, unauthorised deduction from wages (holiday pay), breach of contract, failure to provide a statement of employment particulars and less

favourable treatment as a part time worker. At a preliminary hearing held on 21 January 2021, an Employment Judge directed that the claim should be listed for an open preliminary hearing to determine the following issues;

5 (i) *whether the presented claim of victimisation enjoys “no reasonable prospect of success” and should accordingly be struck out in terms of Rule 37(1)(a); or alternatively, enjoys “little reasonable prospect of success” and its*
pursuance be made the subject of a Deposit Order in terms of Rule 39, both
of the Employment Tribunals (Constitution and Rules of Procedure)
10 *Regulations 2013 Schedule 1 &*

(ii) *whether the claimant has title to present and the Tribunal jurisdiction to*
consider the claimant’s complaints of unauthorised deduction from wages,
insofar as they relate to alleged non-payment of paid annual leave
entitlement said to have occurred in June and July 2018 and April 2019 by
15 *reason of asserted time bar.*

2. Today’s preliminary hearing was listed to consider the above issues. The preliminary hearing was held remotely by Cloud Video Platform (CVP). The claimant was represented by his mother, Mrs L Miller. The respondent was
20 represented by Mr N MacLean, Solicitor.

3. In advance of today’s preliminary hearing agreement was reached in relation to the claim of unauthorised deduction from wages (holiday pay). That part of the claim was withdrawn and dismissed by an Employment Judge on 23

February 2021. For this reason the Tribunal did not consider the second issue identified above concerning time bar.

4. For the purpose of today's hearing the parties provided the Tribunal with a joint bundle, a statement of agreed facts and position statements. At the start of the preliminary hearing the claimant raised concerns about Production 3.2/98 - a chain of emails between members of the respondent's HR. The claimant did not seek a postponement to take advice on the above Production. The e mails (P3.2/98) were referred to by the respondent during the preliminary hearing. It was considered appropriate to allow the claimant an opportunity to make written representations on their relevance to the issue before the Tribunal before any decision was made. The claimant provided the Tribunal with written representations on 12 April 2021.
5. At today's preliminary hearing the claimant read from a statement and was questioned by Mr MacLean for the respondent. Both parties made oral submissions and provided the Tribunal with a written copy of their submissions.

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THE CLAIM OF VICTIMISATION

6. It is not in dispute that the claimant was employed by the respondent from April 2013 until 30 June 2020. He was employed on a guaranteed hours contract (20 hours since 2015). The claimant undertook clerical work

including shredding. The respondent did not offer the claimant any work from 6 April 2019 until 30 June 2020 when he was dismissed. The respondent does not dispute that when dismissing the claimant they failed to follow normal redundancy procedures and a number of their own employment policies. They also do not dispute that they failed to provide the claimant with written reasons for his dismissal when requested, provide the claimant with a right of appeal against dismissal or issue him with a P45.

7. The Tribunal had regard to the available documents in which the claimant has set out his claim. In the paper apart to his ET1, the claimant contends that the respondent stopped offering him work from 5 April 2019, the date on which his mother submitted a grievance to the respondent which included an allegation of sex discrimination. The claimant submits that the reason why he was no longer offered any work (and was consequently dismissed) was his *“known supportive relationship with a family member who had claimed sex discrimination”*. The claimant provided additional information about his claim of victimisation in an Agenda prepared for the preliminary hearing held on 21 January 2021. He identified the protected act that he had carried as described in Section 27(2) of the Equality Act 2010 as *“doing any other thing for the purposes of or in connection with the Act”*. In addition to *“immediate ceasing of offers of work and subsequent dismissal”*, the disadvantage suffered by the claimant as a result of doing the protected act was identified as including loss of pay and the anxiety caused by not being aware of his dismissal until he approached the respondent about a reference. In his Agenda, the claimant stated that; *“The persons responsible are not fully*

known, however it seems likely that at least one member of the senior management team had influence/involvement in the actions that led to dismissal (non-communication of that dismissal, failure to send a P45, contrary/false reasons provided for the dismissal). The dismissing manager would not have had experience nor knowledge of the guaranteed hours contracts so it seems improbable that he could be responsible for the decision to unfairly dismiss”.

8. When asked in the Agenda why he considers that he was subjected to the above disadvantage because he did the protected act, the claimant refers to not being offered any work after his mother’s complaint and that *“not unreasonably (he) was assumed by the respondent, as a result of his familial relationship, to be supportive of the complaint of sex discrimination and/or supportive of the primary complainant.”* The claimant contends that the withdrawal of any further offers of work and the subsequent unfair dismissal are directly connected to his mother’s complaint of sex discrimination.

9. In additional information provided to the Tribunal in response to Orders issued by an Employment Judge at the preliminary hearing on 21 January 2021, the claimant stated that the respondent’s Director of HR, or those acting on his direct authority, took a decision to transfer the work *“belonging”* to the claimant in terms of his contract of employment to an external company around June 2019 which resulted in his dismissal in June 2020. The claimant stated that the respondent has not provided an adequate explanation for his dismissal and failure to follow *“normal processes”*. The claimant alleged that the respondent has made various false claims about his dismissal. The

claimant stated that he supported his mother, in part due to the family relationship but in part because he had direct and independent knowledge that at least some of the counter claims made against his mother by the Director of HR were false.

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10. The claimant stated that his victimisation by the respondent can be evidenced in several ways including the respondent's failure to follow "*normal practice*"; the timing of the respondent's actions; the conduct of the Director of HR; his knowledge of the relationship between the claimant and his mother and the inaccuracy of the respondent's position regarding the type and the frequency of work undertaken by the claimant as "*department shredder*".

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11. In his statement to the Tribunal, the claimant described having a "*degree of awareness*" of his mother's grievance. He disputed that the last occasion he worked for the respondent was a "*one off piece of work*" and that the demand for shredding had reduced to such an extent that he was no longer required to undertake such work. He described his sense of shock on learning that his employment would be terminated at the end of June 2020. He claimed that after his mother raised a grievance, the respondent took steps to affect his dismissal. He referred to his mother having said at the time that "it *might simply be incompetence*" on the part of the respondent but stated that he has in "*absolutely no doubt that (he) was dismissed because (the respondent's Director of HR) did not want him in the workplace because of his family relationship*". The claimant described the respondent's Director of HR, and those who reported to him directly, as not wanting him back in the office because they thought that he had supported his mother and that he might

have already said or might say things in her support. The claimant stated that in the absence of a reasonable explanation and in the context of numerous false claims made by senior members of HR, victimisation seems the only likely explanation.

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APPLICATION FOR STRIKE OUT

12. In terms of Rule 37(1)(a) of the Rules of Procedure 2013, at any stage of the proceedings, either on its own initiative or on the application of a party, a
10 Tribunal may strike out all or part of a claim on the grounds “*that it is scandalous or vexatious or has no reasonable prospect of success*”. It is the respondent’s position that the claim of victimisation has no reasonable prospect of success.

15 13. The respondent accepts that the threshold for striking out a claim for having no reasonable prospect of success, in particular a claim involving discrimination, is high. The Tribunal was referred to the case of **Ezsias v North Glamorgan NHS Trust 2007 EWCA Civ 330** in which the Court of Appeal held that it would only be “*very exceptionally*” that a case should be
20 struck out without the evidence being tested. The Court of Appeal upheld the EAT’s decision that a Tribunal should not be overzealous in striking out a case as having no reasonable prospect of success, unless the facts as alleged by the claimant disclose no arguable case in law. The Tribunal was also referred to the case of **Blockbuster Entertainment Ltd v James 2006**
25 **EWCA Civ 684** in which striking out a claim was described as a “*draconian power*” that should not be exercised lightly.

14. The respondent referred the Tribunal to the case of **Mechkarov v Citibank NA [2016] ICR 1121** in which the approach to be taken by the Tribunal when considering whether a claim should be struck out as having no reasonable prospect of success was summarised as follows;

- *Only in the clearest case should a discrimination claim be struck out.*
- *Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.*
- *The claimant's case must ordinarily be taken at its highest.*
- *If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.*
- *A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.*

15. While the bar for striking out a claim is high, there are of course exceptions. The respondent referred the Tribunal to the case of **Croke v Leeds City Council UKEAT/0512/07** in which the EAT upheld a decision to strike out a claim of victimisation which was "*not, in any ordinary sense of the term, fact sensitive*" and could therefore be struck out without evidence being formally heard. It is the respondent's position that the present case, taken at its highest, does not disclose a case of victimisation that has any reasonable prospect of success and should therefore be struck out.

16. The Tribunal also had regard to the case of **Anyanwu & anor v South Bank Students' Union & anor** 2001 ICR 391 in which **Lord Steyn** stated (at paragraph 24);

5 *“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 demerits of its particular facts is a matter of high public interest.”*

Also, from the case of **Anyanwu**, the Tribunal had regard to Lord Hope's
10 speech (at paragraph 37) where he stated:

*'I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of
15 injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.'*

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DISCUSSION AND DELIBERATIONS

17. Section 27(1) of the Equality Act 2010 provides that 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. In terms of Section 27(2) of the Equality Act 2010, each of the following is a protected act; (a) bringing proceedings under the Equality Act 2010; (b) giving evidence or information in connection with proceedings under the Equality Act 2010, (c) doing any other thing for the purposes of or in connection with the Equality Act 2010 and (d) making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010.

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18. It is not in dispute that the claimant's mother did a protected act in terms of section 27(1)(d) of the Equality Act 2010 by bringing a grievance alleging sex discrimination. The claimant does not seek to show that he did a protected act. He seeks to show that the respondent believed that he did, or may do "*any other thing for the purposes of or in connection with this Act*" in terms of Section 27(2)(c) of the Equality Act 2010. It is the claimant's position that the "*other thing*" the respondent believed he had done or may do, was to support his mother in her grievance alleging sex discrimination.

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19. The Tribunal was not persuaded by the respondent's submission that because the support provided by the claimant was not active in the sense of providing a statement or accompanying his mother to a grievance hearing that it could not be "*any other thing*" in connection with the Act. This is a wide provision. It does not require the claimant to have taken steps to exercise his own statutory rights. The Tribunal was not persuaded that "*any other thing*" does not include

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the act of providing someone who has complained of discrimination with support in a general sense, including moral support provided by one employee to another who has complained of discrimination. The claimant's case is not that he should be protected against victimisation simply because he is the son of an employee who has complained of sex discrimination. His claim is that he should be protected from victimisation because the respondent believed that he supported or would support his mother in connection with her grievance alleging sex discrimination.

20. As regards causation, the respondent submits that the Tribunal should have regard to the reasons they advance for the claimant not being offered work after April 2019 and the lack of formal procedure in his dismissal. It is the respondent's position that informal practices in relation to his employment, from which the claimant asks the Tribunal to draw an inference of discrimination, pre- date his mother's grievance. Similarly, the respondent submits that the claimant's case regarding the frequency of his work and the termination of his contract is not supported by the available information and documents. The Tribunal was not persuaded that the available information including contemporaneous documents conclusively disprove that the reason for the claimant not being offered any further work and subsequently dismissed was because the respondent believed that he would support his mother in her grievance of sex discrimination. The Tribunal was satisfied that there are factual disputes between the parties that cannot be determined without oral evidence and examination at a full hearing. This will involve the Tribunal undertaking an evaluation of the reason advanced by the respondent for the

termination of the claimant's employment and if appropriate drawing inferences from all the surrounding circumstances.

21. In all the circumstances, the Tribunal was not persuaded that the claim of
5 victimisation should be struck out as having no reasonable prospect of
success. There are facts in dispute that are central to the case, not least the
reason for the claimant's dismissal. Explanations advanced by the respondent
for actions taken in relation to the claimant's dismissal are also in dispute and
merit examination at a final hearing. The application for strike is therefore
10 refused.

APPLICATION FOR A DEPOSIT ORDER

22. If the Tribunal was not persuaded that the claim should be struck out, it is the
15 respondent's position that the claimant should be required to pay a deposit as a
condition of continuing to advance his claim of victimisation. In terms of Rule
39(1) of the Rules of Procedure 2013, the Tribunal may make a deposit order
where it considers that any specific allegation or argument in a claim has little
reasonable prospect of success.

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23. For the reasons given above, the Tribunal was satisfied that the allegation of
victimisation on the part of the respondent requires to be heard at a final
hearing before a proper assessment can be made as regards its merit or
otherwise. While recognising that the bar is lower than that for strike out, the
25 Tribunal has similar concerns about making a deposit order on the grounds that

the claim has little prospect of success in particular given that this is a claim involving allegations of discrimination. The claimant should not be required to pay a deposit to pursue his claim where the reason for his dismissal is in dispute and the respondent has advanced explanations for their conduct which

5 the claimant does not accept and require examination by the Tribunal before determination of the claim. The application for a deposit order is therefore refused.

10 Employment Judge: Frances Eccles
Date of Judgment: 17 May 2021
Entered in register: 25 May 2021
and copied to parties