EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No. 4105424/2020

Preliminary Hearing held remotely on 28 June 2021

10 **Employment Judge A Kemp**

Dr M Idowu **Claimant**
In person

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Onorach Limited **Respondent**
Represented by
Mr S Leiper
20 **Director**

JUDGMENT

25 1. **The claimants claims under sections 13, 19, 26 and 27 of the Equality Act 2010 founded on the protected characteristic of religion or belief, are struck out under Rule 37 as having no reasonable prospects of success.**

30 2. **The claim as to indirect discrimination on the protected characteristic of race under section 19 of the said Act is struck out under Rule 37 as having no reasonable prospects of success.**

3. **The remainder of the application for strike out is refused.**

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REASONS

Introduction

1. This was a continuation of the last Preliminary Hearing to address an application made by the respondent to strike out the discrimination claims under Rule 37 on the basis that they had no reasonable prospects of success. There are also claims as to breach of contract, unlawful deduction from wages and for holiday pay.

2. There have been three Preliminary Hearings in this case thus far, the first on 9 December 2020 after which the claimant was ordered to provide further particulars of the claims he was making, the second on 17 February 2021 to determine whether the claimant had the necessary service to claim unfair dismissal, holding that he did not, and the third on 15 April 2021 when the hearing was continued to allow the claimant to provide further and better particulars of his claim. He did so, and the respondent replied to that. The parties each provided their version of a transcript of a meeting, the respondent having provided its one late on 25 June 2021 and not giving the claimant much of an opportunity to review it accordingly. In fact that transcript was not referred to in the submissions.

3. The hearing commenced as a remote one, but the quality of the audio was very poor and that appeared to be because of a difficulty with the internet connection I had. With the parties' agreement I telephoned into the hearing, and it concluded that way. I considered that doing so was in accordance with the overriding objective, and I was able to hear and understand the parties' submissions.

Submission for respondent

4. Mr Leiper set out the argument he made as to strike out. In brief summary he argued that the discrimination claims should be struck out as they had no reasonable prospect of success from the evidence as a whole submitted by the claimant. He had had three or four opportunities to do so. No comparator had been produced. There was no proof of racial discrimination. The belief the claimant referred to (addressed below in the claimant's submission) did not fall within the Equality Act 2010. On the

claim for harassment there had been a legitimate reason to obtain the return of company equipment after harassment, as set out in the draft Initial Writ that had been prepared. The visit to the claimant's property had been arranged in advance and was solely to require the return of that property. If the claimant was to be believed many other professional parties were guilty of discrimination, such as accountants and lawyers. If the claim proceeds the respondent would vigorously defend it and seek to recover its cost of doing so.

5. Mr Leiper confirmed that the application to strike out was made in respect of the discrimination claims only and not for those as to breach of contract, unlawful deduction from wages or for holiday pay.

Submission by claimant

6. The following is also a brief summary of the submission. The claimant was asked initially to explain further the beliefs he founded on. He said that there were golden rules for ethical research one of which was to treat every person with respect and dignity regardless of religion or belief. He had joined what was called the PharmaLedger project before he was an employee. The respondent's should have adhered to the golden rules of ethical research, respect the dignity of person's and their rights and not override them. He was also asked to set out how the Provision, Criterion or Practice (PCP) on which he founds disadvantaged those of his race, being the protected characteristic on which he founds. He argued that often people believe that a black man is not competent, and regularly require to show extra effort to justify their performance. He was asked about the protected act he founded on for the claim as to victimisation, and referred to Mr Leiper being his line manager, and that he brought his concerns to his line manager although he was the person being complained about.

7. In relation to the application to strike out he argued, in effect and summary, that it should not be granted. He argued that he had been treated differently than a white colleague would have, and although there were

particular comparators for specific matters he indicated that it was a hypothetical comparator he generally relied upon. It was in the last three months of his employment that he considered that he was targeted because he was black. There was harassment in the calling at his home. The server had been located at his house, and used energy, but that indicated that he was trusted with it. There was no reason to consider that it was in any danger. It was also used for his personal emails, and documents. He had a right to privacy. The respondents had arrived at 4pm when he was collecting his children from school, he having four children. He had needed time to sort matters out after the abrupt dismissal. In relation to the argument as to other professionals they were not blamed for the actions of the respondent. On the reference to seeking costs that undermined the effectiveness of sound judgment. The allegations he had made were based on evidence.

The law

8. Strike out of a claim or response is addressed in Rule 37, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which provides:

> "**37 Striking out**
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> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
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> (a) that it is scandalous or vexatious or has no reasonable prospect of success
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious……
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)"

9. Rule 37 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

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"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

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(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

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(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration

20 of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in

25 interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

30 10. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion

35 whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the

bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

11. As a general principle discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

> "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 demerits of its particular facts is a matter of high public interest."

12. Lord Hope of Craighead stated at paragraph 37:

> " … 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 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."

13. Those comments have been held to apply equally to other similar claims, such as to public interest disclosure claims in ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603***. The Court of Appeal there considered that such cases ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits. The following remarks were made at paragraph 29:

"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence."

14. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

15. That it is competent to strike out a discrimination claim was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias stated that

"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."

16. In ***Mechkarov v Citi Bank NA [2016] ICR 1121*** the EAT summarised the law as follows:

"(a) only in the clearest case should a discrimination claim be struck out;
(b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
(c) the claimant's case must ordinarily be taken at its highest;
(d) if the claimant's case was 'conclusively disproved by' or was 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it could be struck out;
(e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

17. When considering claims made by those who are representing themselves it is not sufficient only to consider the case as pled, but it is necessary to review all the material before the Tribunal, (***Morgan v DHL Services Ltd UKEAT/0246/19)***.

5 18. ***Cox v Adecco and others UKEAT/0339/19*** contains a summary of the law as to strike out, particularly where the claim is pursued by a litigant in person, as is the case here. It emphasised that both parties have duties under the overriding objective, and in respect of claimants said the following:

10 "So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for
15 failing to get to grips with all the possible claims and issues."

19. The requirements for claims of direct discrimination are primarily found in section 13 of the Equality Act 2010, for indirect discrimination in section 19, for harassment in section 26 and for victimisation in section 27.

20. What is a religious or philosophical belief is set out in section 10 of the Act.
20 The EAT in ***Grainger plc & others v Nicholson [2010] ICR*** reviewed the jurisprudence relating to belief in considering the materially similar predecessor provisions (contained in the Employment Equality (Religion or Belief) Regulations 2003) and endeavoured to set out the criteria to be applied in determining whether a belief qualifies for protection. At para 24,
25 Burton P held as follows:

"24 I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the 2003 Regulations, but before I turn to consider Mr Bowers' suggested such limitations, I shall endeavour to set out the limitations, or
30 criteria, which are to be implied or introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in ***McClintock v Department of Constitutional Affairs [2008] IRLR 29***, an opinion or viewpoint

based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 36 of ***Campbell v United Kingdom 4 EHRR*** 293 and para 23 of ***Williamson's case [2005] 2AC 246***)."

21. These criteria have since been applied in several cases and are reflected in the guidance on philosophical belief contained in the Equality and Human Rights Commission's Code of Practice: Employment at paragraph 2.59. It is also relevant to consider ***R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15*** in which it was held that the bar should not be set too high, considered in ***Harron v Dorset Police [2016] IRLR 481***

22. Section 27 of the Equality Act 2010 provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(*a*) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(*a*) bringing proceedings under this Act;

(*b*) giving evidence or information in connection with proceedings under this Act;

(*c*) doing any other thing for the purposes of or in connection with this Act;

(*d*) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

5 **Discussion**

(i) Belief

23. I deal first with the claimant's argument as to his religion or belief. It has been difficult to obtain clarity from him on what he seeks to found, but it 10 was explained during the hearing before me as summarised above. On the basis of that description, and I found nothing else of material assistance from the Further and Better Particulars or documents relied on by the claimant, I do not consider that the belief founded on has any reasonable prospect of meeting the statutory definition as explained in 15 ***Grainger***. The belief expressed is not a belief as to a weighty and substantial aspect of human life and behaviour. It may well be important to the claimant, and others in research, but in my judgment it requires to be more generalised in this respect. Similarly it has not attained the level of cogency, seriousness, cohesion and importance that is required in this 20 context. I appreciate that this view is formed before evidence is heard, however I considered that the test in Rule 37 that there was no reasonable prospect of success in this matter is met. These matters are generally fact specific, but I did derive some assistance from the case of ***Gray v Mulberry Co (Design) Ltd [2020] IRLR 29***, in which the claimant was 25 dismissed as she continued to refuse to sign a contract of employment which contained provision for copyright in matters produced in the course of her work belonging to her employer, fearing (despite accommodations) that this might include copyright in her existing personal work. Her claim was based on a belief in 'the statutory human and moral right to own the 30 copyright and moral rights of her own creative works and output'. The Employment Tribunal held that this was not sufficient to amount to a 'belief' under s 10. The EAT and Court of Appeal both rejected her appeal.

24. Separately there are insufficient primary facts pled, or which were referred to in the documents submitted or in oral argument, which could lead to a conclusion that any of sections 13,19, 26 or 27 of the Act had been breached because of the said belief or a PCP or conduct related to it. The claimant's argument amounted to one that he should have been treated with dignity and respect, and was not. The sections require more than that however. A direct discrimination claim requires less favourable treatment because of the protected characteristic which in this regard means that the dismissal must have been because of the beliefs the claimant refers to, but there is nothing to support that argument. The indirect discrimination claim requires a PCP that places those with the same belief at a disadvantage, but there is nothing to support that argument. The claims of harassment and victimisation must relate to or be because of the belief respectively, but again there is nothing to support that argument.

25. I concluded that there is no reasonable prospect of the claimant succeeding with any claim of discrimination based on having a religion or belief under section 19 of the Act. In then considering whether it is proportionate to strike it out, I took into account firstly that the claimant has had several opportunities to elucidate the claim, and secondly that other claims of discrimination are permitted to proceed as set out below, and concluded that it was proportionate to strike them out.

(ii) Direct discrimination

26. It remains not easy to ascertain all aspects of the claimant's claim as to direct discrimination on the protected characteristic of race, and his position on the comparator is not as clear as it might be, in that he has referred to a hypothetical comparator whilst also saying that there are other actual comparators he has not named. The test for strike out is a very high one as set out above. I consider that the claimant has provided sufficient detail, just, to meet it. He sets out a number of matters that may, if proved in evidence, suffice to provide primary facts from which the inference of discrimination could be drawn, absent an explanation for them. They are present within other material that appears to be irrelevant, but they are there nevertheless. The respondent disputes them, but for

present purposes that is not the point. There is a core of disputed fact in this case. The core facts may or may not be held established, and that is dependent on the evidence heard, which includes not just the terms of written documentation which the respondent argues is insufficient but also oral evidence by the witnesses who are called. The claimant does have the burden of proof, but that in turn depends on whether or not he can establish a prima facie case. He has arguments on that from the material submitted. It is I consider better that I do not spell those out in this Judgment as matters will depend not on submission to me at this stage but the evidence heard and the full submissions then made about that evidence. It is possible that the evidence is not the same as the submission before me and that reliance is not placed on all of the factors that I consider are sufficient to require me to refuse the application for strike out. If his prima facie case is made out, the burden may then shift under section 136. It may or may not then be discharged. I do not consider that the test for strike out in this regard is met, and it is refused.

(iii) Indirect discrimination

27. One of the matters that requires to be established under section 19 of the Act is that the PCP puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it. The characteristic on which the claimant founds is that he is a black man. The PCP he founds on is that all the IT work for the respondent was given to him alone. It is not clear from that why those of any particular race or group, or the claimant's race as a black man, would suffer a particular disadvantage from such a PCP. It was not explained in any of the written material submitted nor in the oral submission. I asked him to explain to me how he considers those with whom he shares that characteristic are put at a disadvantage by the application of the PCP. His answer I have described above, but I do not consider that it has any reasonable prospect of meeting the statutory test. I concluded that there is no reasonable prospect of the claimant establishing a breach of section 19 in light of that.

28. I then considered whether it was proportionate to strike out the claim in this regard, and concluded that it was firstly as the claimant has had a number of opportunities to set out his claim, and secondly as the direct discrimination claim is not struck out and the issues he sought to raise in relation to indirect discrimination may, and it can be put no higher, be relevant in that context. The indirect discrimination claim is accordingly struck out.

(iv) Harassment

29. The claim for harassment is made under section 26 of the Act. It appeared to me that the claimant had pled sufficient to require me not to strike this out. It is at the least unusual for a former employer to attend at the house of the former employee to require return of property. There had been a variety of communications in advance of that in fairly strident terms. The claimant may have felt that that situation met the statutory definition, and his perception is one of the factors to take into account, but which is a part of core disputed facts. It is not clear whether or not the actions were because of the claimant's protected characteristic, or simply as the respondent contended as it wished quickly to recover property it owned that was important to it. The issue of causation is however also part of the core of disputed facts, and in that situation I consider that it would not be appropriate to strike out this claim, and the application in this regard is refused.

(v) Victimisation

30. The claimant was asked to explain on what protected act he sought to found for the purposes of section 27. Whilst he did not say so in terms that referenced section 27, he did refer to his complaints made to Mr Leiper the Chief Executive Officer of the respondent which he argued were about discriminatory treatment. This aspect is far from clear, but I consider that it is not appropriate to strike it out. Two categories of allegation falling short of an express allegation of breach of the Equality Act 2010 have

been identified in case law. In the first the complainant alleges that things have been done which would be a breach of the Act but does not say that those things are contrary to the Act: ***Waters v Metropolitan Police Commissioner[1997] IRLR 589***, in which Waite LJ said the following in relation to predecessor statutory provisions:

> "The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b).'

31. In the second the complainant asserts that there has been discrimination but does not say that the allegation is of discrimination in relation to one of the protected characteristics, ***Durrani v London Borough of Ealing UKEAT/0454/2012.***

32. It is, just, arguable that the claimant can establish in evidence that he made complaints which fell into one of those categories, or is otherwise within the terms of the section. If so, it is then arguable that the reason for the dismissal was his doing so, and that that was related to the protected characteristic founded on. In this situation I consider that it would not be appropriate to strike out this claim, as it is part of the core of disputed evidence, or at least may be so. This part of the application is refused.

Conclusion

33. All the claims made under the Equality Act 2010 by the claimant so far as founded on the protected characteristic of religion or belief, and the claim as to indirect discrimination founded on the protected characteristic of race, are struck out as having no reasonable prospects of success.

34. The remainder of the application for strike out is refused. The matter will therefore proceed to the Final Hearing for determination of these claims together with those for breach of contract, unlawful deduction from wages, and holiday pay.

35. For the avoidance of doubt this Judgment should not be taken as an indication that the claims, or any of them, that are not struck out do have reasonable prospects of success. Whether they succeed or fail will be dependent on the evidence led.

5 36. The respondent intimated that it would seek its costs in defending the claims, such costs being known as expenses in Scotland, but that is not a matter that is relevant to the issues before me in this hearing, and the respondent did not seek a deposit order. The issue of expenses is regulated by the Rules, particularly Rules 74 – 84 and neither party should 10 assume from this Judgment that any application for expenses would be granted or refused, in whole or part, if made.

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Employment Judge:	**A Kemp**
Date of Judgment:	**29 June 2021**
Date sent to parties:	**30 June 2021**