



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107686/2021

**Held on 14 and 15 June 2021
(By Video Conference, CVP)**

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**Employment Judge R Gall
Tribunal Member P McColl
Tribunal Member D Frew**

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Mr J Owusu

**Claimant
In Person**

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Dundee City Council

**Respondents
Represented by:
Ms M Morrissey –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Unanimous Judgment of the Tribunal is that the claim of victimisation brought in terms of Section 27 of the Equality Act 2010 is unsuccessful.

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REASONS

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1. This claim was heard on 14 June 2021. The claimant appeared on his own behalf and gave evidence. Ms Morrissey represented the respondents. Evidence for the respondents was given by Ms Ridley. She had been supervisor of the provider of the reference, Ms Adamson, and had “double checked” the reference and agreed to it being sent in the terms in which it

was given. Ms Ridley participated in this hearing by telephone. Both parties agreed to her evidence being taken by that means in circumstances where obtaining a connection enabling her to be seen as well as heard proved impossible. A joint file of documents was submitted.

- 5 2. There was no evidence about loss and in those circumstances it was agreed that this hearing would determine liability alone with a further hearing taking place in the event of success for Mr Owusu.
3. There was little dispute about the facts.
4. The claim made is that the terms of a reference given by the respondents to a prospective new employer of the claimant constituted a detriment. Mr Owusu said that he had been subjected to the detriment because of a protected act. That protected act was the bringing by him of an earlier claim of discrimination, unfair dismissal and wrongful dismissal against the respondents. That claim was unsuccessful in all regards after a hearing.
10 The claim of wrongful dismissal had initially been successful. After reconsideration it was, however, confirmed by the Employment Tribunal as being unsuccessful. The claimant had not therefore in the view of the Employment Tribunal who heard that claim, been discriminated against, been unfairly dismissed or been wrongfully dismissed. This is mentioned
15 as the claimant at one point in looking at the reference and the dismissal letter, sought to argue that the Employment Tribunal had held that he had been wrongfully dismissed. He had been summarily dismissed. The decision of the Employment Tribunal was however, after reconsideration, that summary dismissal was appropriate in that gross misconduct had
20 occurred.
- 25 5. The respondents said that they had provided a reference in terms which would have been the same if there had been no protected act, or if the employee involved had been someone other than Mr Owusu, who had been dismissed, but who had not presented a Tribunal claim.
- 30 6. It was a matter of agreement that the bringing of the earlier claim was a protected act.

7. It was also a matter of agreement that the conduct of this case did not involve revisiting the Judgment in the earlier case to relitigate the matters dealt with in that case. This claim related solely to the giving of the reference in 2020. The sole protected act was the making of discrimination claim to the Tribunal in 2012.

Facts

8. The following were found to be the relevant and essential facts as admitted or proved. Where evidence was disputed, the Employment Tribunal has to determine facts on the balance of probabilities.
9. Mr Owusu was employed by the respondents between 2 February 2004 and 30 April 2012. He was dismissed without notice on the latter date. The letter dismissing him appeared at page 101 and 102 of the file. His role had been as a team leader in the respondents' Parking Services division.
10. Mr Owusu brought a claim of unfair and wrongful dismissal and of discrimination to the Employment Tribunal. That claim was unsuccessful, save for the wrongful dismissal element. The Judgment in the case appeared at pages 71 to 100 of the file. It was common ground that the Judgment had been reconsidered and that the decision had been confirmed, other than that in relation to wrongful dismissal. That element of the judgment was revoked and it was found by the Employment Tribunal that the claim of wrongful dismissal was unsuccessful.

Application by the claimant for employment with The Royal Borough of Kingston Upon Thames ("KUT")

11. Mr Owusu applied to KUT for the post of parking contract manager. A request was made by KUT for a reference to be supplied. An approach was made by them. That approach was made to Janet Robertson. It arrived with the respondents on 27 October 2020. By that time Ms Robertson, who had been head of Human Resources within the respondents' organisation, had retired. The reference request was therefore passed by the respondents to Allison Adamson. She is a member of the respondents' HR team. Her line manager is Valerie Ridley.

Ms Adamson was absent from work through ill-health at time of this hearing.

12. Ms Adamson had attended the disciplinary hearing and the appeal at time of dismissal of Mr Owusu in 2012. She had not however been a decision maker in either of those processes. Ms Ridley gave evidence. Ms Ridley saw and checked the reference prepared by Ms Adamson before it was sent by the respondents to KUT. Ms Ridley was not directly involved in the disciplinary or appeal processes at time of Mr Owusu's dismissal in 2012. She was not a decision maker in either of those processes.
13. In normal circumstances the reference would have been passed to the service area in which an ex employee had worked. When this request for a reference was received, however, Mr Owusu's former direct line manager, Mr Gellatly and the director of planning and transportation during Mr Owusu's time of employment, Mr Galloway, had retired. No-one who had had a management role in relation to Mr Owusu remained in employment of the respondents when the request for a reference from KUT was received.
14. The respondents have no policy in relation to what is or is not to be provided when responding to reference requests.
15. Ms Adamson completed the reference request on the basis of the information she had. That proposed response was, as mentioned, checked and approved by Ms Ridley prior to being sent. A copy of the reference given appeared at pages 55 and 56 of the file.
16. Some parts of the reference form sent for completion by the respondents were not fully answered by them. When asked for their views on Mr Owusu's skills, abilities and experience for the post, they stated that he was employed in a similar role by them. They might potentially have been able to have been fuller in their reply as they had appraisal records for Mr Owusu. Those appraisal records were part of the file at this hearing. They appeared at pages 129 to 168 of the file. Those who had been his line managers during employment with the respondents had retired, however, as mentioned. The last appraisal the respondents held on record was carried out around a year before he had been dismissed by them. The

respondents did not therefore regard themselves as being in a position to provide a fuller answer to the question asked. They did not explain that they were of the view that they could not comment due to line managers no longer being in their employment.

- 5 17. In the reference request in a question (question 3) which appeared at page 55 of the file, the respondents were asked whether Mr Owusu had been “*subject of any management action*”. The question went on to ask that “*full details including dates, the nature of the (alleged) offence, poor performance or poor attendance and the outcome, where applicable*”,
10 were provided.
18. The reply from the respondents was that “*Mr Owusu was dismissed following investigation into a number of allegations of misconduct which were substantiated at a disciplinary hearing and deemed to have caused an irretrievable breakdown in the working relationship.*”
- 15 19. This answer was one which would have been given in circumstances where an employee had been dismissed for gross misconduct but had not brought an Employment Tribunal claim. It was not issued in the terms in which it was because Mr Owusu had done a protected act, “because” being interpreted as set out below in the “Applicable Law” section of this
20 Judgment. It was not a subjective opinion. It was accurate having regard to the letter confirming dismissal. A copy of that letter appeared at pages 101 and 102 of the file as mentioned. It contained the following sentence:-
25 “*I believe that your conduct has caused upset and alarm amongst team members and has resulted in the breakdown of trust and confidence required by the Council*”.
20. Mr Owusu was aware of the allegations against him at his disciplinary hearing. He was aware of the reasons for his dismissal. The respondents would have provided fuller information to KUT in relation to Mr Owusu’s dismissal had KUT asked for that. There was nothing in relation to the
30 provision of information or absence of information in the response to the reference which was because of there having been the protected act.

The issue

21. The issue for the Employment Tribunal was whether the reference given in the terms in which it was, in response to question 3 of the request, was victimisation in terms of Section 27 of the Equality Act 2010 (“the 2010 Act”). If it was a separate hearing would be held to determine remedy.

Applicable Law

Section 27 of the 2010 Act states, insofar as relevant:-

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

- 10 *(a) B does a protected act”*

22. It was a matter of agreement in this case that the bringing of the previous Employment Tribunal claim constituted a protected act as that is referred to and defined in Section 27 of the 2010 Act.
23. Cases have considered the interpretation to be given to “because” in Section 27. It does not mean that the protected act requires to be the sole, or even primary, reason for the detriment. It does not involve a “but for” approach. Rather, an Employment Tribunal has to consider the evidence and to come to a view as to what it regards, on the evidence it hears, as being the real reason, the core reason or the motive of the employer in doing the act in question. In a case decided before the 2010 Act was in place, but which is of relevance in applying the 2010 Act, *Nagarajan v London Regional Transport* 1999 ICR 877 it was held that if protected acts have a ‘significant influence’ on the employer’s decision making, discrimination will be found to have taken place. *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* 2005 ICR 931, is also a case under previous legislation, but which contains principles applicable to cases under the 2010 Act. It confirmed that for an influence to be ‘significant’ it does not have to be of great importance. A significant influence is rather, it was said in the Judgment, ‘*an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.*’

24. The provisions of the 2010 Act as to burden of proof applied given that this was a claim of discrimination. Section 136 states, insofar as relevant:-

“Burden of proof

5 (1) *This section applies to any proceedings relating to a contravention of this Act.*

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.”*

10 **Submissions**

Submissions for the claimant

25. Mr Owusu said he had received a bad reference from the respondents. That had led to the job offer to him being withdrawn. He had no issue with the respondents having confirmed that he had been dismissed. That was
15 a factual statement. The statement, however, of the reason for dismissal was, he said, misleading and unfair. It should have provided additional information of an honest nature.

26. The response confirmed Mr Owusu’s view, he said, that since the previous Tribunal case he had been met with victimisation. There had been a
20 protected act. Those involved in the giving of the reference were aware of the previous proceedings. That earlier claim had informed their actions. The reference had been completed with melodramatic, subjective and malicious information. To go beyond stating he was dismissed was a malicious act carried out because he had brought the earlier claim. A basic
25 or standard reference could have been given confirming his employment role and dates of employment. The reference had been provided in the terms in which it had all because he had raised a claim against the respondents. The evidence confirmed that.

Submissions for the respondents

30 27. Ms Morrissey said that while the respondents accepted that there was a protected act, they denied that any alleged detriment, as the claimant

detailed it, was because of the protected act. It was not therefore victimisation in terms of Section 27 of the 2010 Act.

- 5 28. The respondents said that they had provided a reference in terms which would have been the same if there had been no protected act, or if the employee involved had been someone other than Mr Owusu, who had been dismissed, but who had not presented an earlier Tribunal claim. They would have answered the question asked in the same manner and detail.
- 10 29. No opinion was given as to Mr Owusu's suitability or performance given that there were no line management personnel who had had responsibility for Mr Owusu employed at the time the reference was sought. Appraisals did not give information to enable a response on those matters to be given. The absence of comment in this area was unrelated to there having been a previous Tribunal claim made by Mr Owusu.
- 15 30. The information given was factual and accurate. It did not exactly quote the dismissal letter word for word. It did however reflect what the reason for dismissal was as set out in the dismissal letter.
31. The Tribunal should accept Ms Ridley's evidence. There was no malice. The fact that there was a previous claim brought had not played a part in the mind of the respondents in the reference given.
- 20 32. There was no policy as to only basic information being given. The reference given did not therefore depart from any such policy.
33. There was, Ms Morrissey said, simply no evidence that the reference was in any way connected to there having been a previous claim made by Mr Owusu.
- 25 34. Mr Owusu had said that more information should have been given. It was arguable that giving more information would have been more clearly problematic for him. There was certainly no evidence that it would have improved his position, Ms Morrissey submitted. KUT could have given evidence if they were of that view. They did not give such evidence at this
- 30 hearing.

35. A reference required to be true, fair and accurate. It did not require to be comprehensive. The case of *Bartholomew v London Borough of Hackney* 1999 IRLR 248 was cited by Ms Morrissey.

36. No duty of care had been breached by the respondents. They could not
5 answer the question in an unfair or misleading way.

37. In short, whilst Mr Owusu might be unhappy that the reference was given as it was and that his job had fallen through, without accepting the two were connected, this case was based on a feeling he had that the previous case had caused the reference response to be as it was. Nothing
10 supported there being any connection between the previous case and the terms of the reference. The claim should be dismissed, the respondents argued.

Claimant's brief response

38. Mr Owusu said that *Bartholomew* was not a similar situation to that in this
15 case. He might have been aware of the reasons for his dismissal, but KUT were not made aware of them from the reply. The reply to the reference set out an opinion.

Discussion and Decision

39. The evidence in this case concluded at just prior to 3pm on the first day
20 set down for hearing. Mr Owusu and Ms Morrissey were asked whether they were happy to proceed with submissions or whether they wished a break to gather their thoughts. Mr Owusu asked for 5 minutes to gather his thoughts. This occurred. The hearing resumed at 3.10pm and each party made their submissions.

25 40. Having heard submissions, a timetable was set out for delivery of an Oral Judgment in the case the following day. The Tribunal discussed the evidence and law and came to a decision in the case. The Oral Judgment was prepared and was delivered the following day at 2.30pm. A copy of what was said in the Oral Judgment was sent to parties.

30 41. Mr Owusu subsequently sought, within the appropriate time, full reasons in terms of rule 62. This Judgment is in response to that request.

42. The Tribunal appreciated from Mr Owusu's evidence that he remains of the view that the original decision upon his claim in 2014 was incorrect. It also understands that he continues to be of the view that there were no grounds on which he ought to have been dismissed.
- 5 43. As had been confirmed with him at the Preliminary Hearing in this case held for case management purposes, the matters dealt with in the original claim were not matters to be aired or challenged once more in this case. On occasion Mr Owusu threatened to stray into those areas. He quickly departed from them, however, when this was pointed out to him.
- 10 44. What the Tribunal had to do in this case was to consider the reference given and the fact that there was a protected act, the bringing of the proceedings which led to the 2014 Judgment. Was the reference a detriment to which Mr Owusu had been subjected because of having done that protected act?
- 15 45. At one point in his submissions, Mr Owusu said that the respondents had said they would not provide him with details of the allegations. This, he said, contrasted with the fact that the respondents were prepared to give those details to his prospective new employers, had they asked. This was not, however, a position adopted by Mr Owusu in his evidence, being an argument which became apparent only through cross examination. It was difficult, in fact, to read the correspondence on this point in the way advanced by Mr Owusu. He knew the details of the allegations against him and why he had been dismissed. He knew that information at the time of the disciplinary hearing and dismissal and certainly, at the very latest, through the full exploration of those matters at the earlier Tribunal hearing. In this regard he referred to his email at page 69 of the file, contrasting that, in his view, with the position of Ms Ridley set out in paragraph 9 of her written statement, at page 174 of the file.
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- 30 46. In the view of the Tribunal Mr Owusu had not sought from the respondents information as to what allegations had been made against him, with that then not being given to him. Rather what he sought was information as to why full details would apparently have been made known to KUT had they asked for them. There was therefore no contrast or difference of position

as between the what the respondents were prepared to supply by way of information to KUT on the one hand and Mr Owusu on the other. A suggestion that KUT had been told, or could have had, full details of the allegations whilst Mr Owusu did or have or could not get those from the respondents was without foundation. Mr Owusu had not asked the respondents what the allegations were only to be denied that information. This is not an argument which was in any event advanced by Mr Owusu when he gave evidence. It was explored by Mr Owusu in cross examination. It was then covered by Ms Morrissey in her submissions. It is mentioned at the moment to reflect the fact that Tribunal was aware of it and considered it. It was something which was also covered in the Oral Judgment delivered.

47. The Tribunal could see why Mr Owusu was frustrated with the response to the reference request. It might have been better for him had a basic “dates of employment and details of role” reference been given by the respondents. They had no policy to provide a limited reference of that type however. The reference given for Mr Owusu was not therefore a departure from their norm.

48. Equally, the reference might have said something about his performance based on the appraisals. It did not. The Tribunal was satisfied on 2 points in this regard. Firstly, that the reference had been handled by appropriate personnel given that line managers of the claimant were no longer in the employment of the respondents. Secondly, there was a rationale for Ms Adamson/Ms Ridley not making reference to the appraisals. The appraisals were from varying times, the one most recent in time to the claimant’s dismissal being dated almost a year before his dismissal. The Tribunal was also satisfied that the absence of information in the reference about or based on appraisals was not something which occurred because of the protected act.

49. The Tribunal was conscious of the burden of proof provisions in Section 136 of the 2010 Act. It did not regard there as being any facts proved from which the Tribunal could decide in absence of any other explanation that discrimination had occurred. If there were any such facts, it was satisfied

that the respondents had provided cogent and “discrimination free” reasons for their actions.

50. The Tribunal was also satisfied that there was no basis on which it was established or from which any properly founded inference could be drawn that there had been conscious or subconscious connection in the mind of Ms Adamson or Ms Ridley between the previous claim brought and the terms of the reference as given. There was no hint of malice, to quote the position advanced by the claimant, on the part of Ms Ridley detected by the Tribunal. There was nothing which gave a basis for that being the case on her part or that of Ms Adamson.

51. The Tribunal was entirely satisfied and was unanimous in its view that there was no basis on which the terms of the reference, taking those as a detriment, were because of the bringing of previous proceedings, the protected act. That was on the application of the interpretation to be given to “because of” as detailed above.

52. In those circumstances the Employment Tribunal was unanimously of the view that the claim was unsuccessful.

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Employment Judge:
Date of Judgment:
Date sent to parties:

R Gall
15 June 2021
14 July 2021

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