EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No. 4105424/2020

Preliminary Hearing held by remotely on 19 August 2021

10 **Employment Judge A Kemp**

Dr M Idowu	**Claimant** **In person**

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

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondent's application for a deposit order is refused.

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REASONS

Introduction

1. This was a further Preliminary Hearing to address an application made by the respondent for a deposit order. It was held remotely by Cloud Video Platform.

2. There have been four Preliminary Hearings in this case thus far, and after the most recent of them held on 28 June 2021 I struck out some, but not all, of the claims. At that stage the respondent had not sought a deposit order as an alternative. The respondent sought that order in an email dated 4 August 2021. The claimant produced documentation including the Claim Form, Further and Better Particulars and his agenda return, for consideration at the hearing.

3. The Final Hearing is to commence on 1 September 2021.

Submission for respondent

4. Mr Leiper set out the argument he made. In brief summary he argued that the discrimination claims he referred to in his written argument, being those made under sections 13, 26 and 27 of the Equality Act 2010 should be subject to a deposit order as they had little reasonable prospect of success. He referred in his written and oral submissions to comments made in the Judgment issued after the last Preliminary Hearing as to the manner in which the claims had been pled, referred to as not as clear as they might be, and that a claim was "just arguable", and related matters. He suggested that in the documentation provided by the claimant for the purposes of the hearing before me that no further detail of issues had been given, such as the comparator. He argued that the respondent had been justified in attending the property of the claimant to recover IT items as there was a concern that commercial damage may be done, and that he had attended the property before and met the claimant's wife when doing so. He stated that the respondent was a small business which employed less than 10 people, had lost substantial sums in the pandemic, but would pursue expenses if the claim proceeded and was dismissed.

5. He referred to the authority of ***Wright***, paragraphs 33 and 34 in particular, which is an authority cited below. He argued that the claims referred to had little prospects of success and he sought the maximum deposit of £1,000 for each of those three claims. He said that the respondent would engage counsel for the Final Hearing and that if successful in defending the claims the respondent would seek an award of expenses against the claimant.

Submission by claimant

6. The following is also a brief summary of the submission. The claimant argued that the deposit order should not be granted, that he had provided sufficient detail and that his claim did not have little prospects of success. On the issue of the comparator he said that that was a hypothetical comparator but also that all of the respondent's then employees were hypothetical comparators and he named in particular Martin Robison and Jackie Purdie. He disagreed with the respondent about attending his property and meeting his wife, saying that he had been dropped off only once when late at night. When asked to clarify the position relating to the protected act for the section 27 claim he referred to a complaint he had made in relation to payments made to him at a salary review meeting. He alleged that the respondent had not complied with orders, not provided a full transcript, and had otherwise acted to frustrate the claims proceeding or to make them more difficult to pursue.

7. He set out his financial position when requested to do so. He is unemployed and reliant on State benefits. He has a wife and four children aged 18, 16, 14 and 12. His benefits are currently about £1,500 per month but are to reduce in September 2021 to, he thought, about £1,000 per month. He has rent of about £480 per month. His youngest three children attend private school under a bursary scheme, for which he has been paying £600 per month. His oldest daughter is shortly to move to England for University. His wife is shortly to commence a Master's degree in nursing. He has about £500 in savings and otherwise no income or capital.

The law

8. A deposit order is provided for in Rule 39 within the Employment Tribunals (Constitution and Rules of Procedure) Regulations, Schedule 1, which provides:

> "**39 Deposit orders**
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> Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospects of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument….."

9. Rule 39 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

> "**2 Overriding objective**
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> 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;
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> (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;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
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> (e) saving expense.
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> A Tribunal shall seek to give effect to the overriding objective in 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."

10. The EAT considered the issue of a deposit order in ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14,*** in which the following was said in paragraphs 33 and 34:

“The test for the ordering of a deposit is that the party has *little* reasonable prospect of success; as opposed to the test under r 37 for a strike-out (*no* reasonable prospect of success). Although that is a less rigorous test, the tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim. There is little guidance in the authorities as to what is meant by little reasonable prospect of success, although it was considered by Bean J (as he then was) in ***Community Law Clinic Solicitors and others v Methuen*** ***UKEAT/0024/11/LA***, who doubted whether there was any real difference between little reasonable prospect of success and little prospect of success. In that case the ET had made a deposit order but had refused to strike out the claims. There was no appeal against the deposit orders. The EAT was concerned only with the strike-out issue and ruled that the Employment Judge should indeed have struck out the claims of sex and race discrimination.

When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order made was one which no reasonable Employment Judge could make or that it failed to take into account relevant matters or took into account irrelevant matters.”

11. It also did so in ***Tree v South East Coastal Services Ambulance NHS Trust UKEAT/0043/17***, in which the EAT summarised the law as follows:

“[19] This potential outcome led Simler J, in ***Hemdan v Ishmail [2017] ICR 486 EAT***, to characterise a Deposit Order as being “rather like a sword of Damocles hanging over the paying party” (para 10). She then went on to observe that “Such orders have the

potential to restrict rights of access to a fair trial" (para 16). See, to similar effect, ***Sharma v New College Nottingham UKEAT/0287/11*** para 21, where The Honourable Mr Justice Wilkie referred to a Deposit Order being "potentially fatal" and thus comparable to a Strike-out Order.

[20] Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under r 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in ***Anyanwu v South Bank Students' Union [2001] IRLR 305 HL*** per Lord Steyn at para 24 and per Lord Hope at para 37.

[21] In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the express requirement - see r 39(2) - that the ET shall "make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit". An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see ***Hemdan*** at para 11.

[22] Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus

avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.

[23] Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see ***Wright*** at para 34."

12. More recently in ***Adams v Kingdom Services Group UKEAT/0235/18*** the EAT further reviewed the law in relation to such orders.

Discussion

13. This was a finely balanced decision. There are arguments in favour of granting the deposit order sought. The claims for discrimination being made appear to me to be towards the lower end of the range of prospects of success, as it is not easy to see why the protected characteristics relied on are the reason for the acts which are alleged to be detriments, or the conduct complained of. The claimant does not appear to have a good understanding of some of the important concepts that are part of his claims in this regard. He confused in his submission, to give but one example, a hypothetical comparator with an actual comparator, with the former being said to be all or at last two of the employees of the respondent. The position with regard to the protected act he founds on for the claim under section 27 is still not easy to identify clearly, and although he said that he made a complaint at the salary review meeting he did not clearly explain why that complaint was of breaching the 2010 Act itself.

14. I concluded that despite those arguments it was not in accordance with the overriding objective to make the deposit order contended for. I did so for the following reasons:

    (i) The discrimination claims are ones that are likely to turn on the Tribunal's assessment as to core disputed facts. It is not I consider possible in this case to assess purely from submission whether or not the claimant's or respondent's evidence will be preferred, and therefore whether the claim has little reasonable prospects of success.

To give one example the parties dispute the circumstances surrounding the attendance at the claimant's property by the respondent to seek to recover items from him. The claimant alleges that that amounted to harassment under section 26 of the Act, the respondent alleges that it was for good business reasons and was not a breach of that section. These are matters that I consider cannot adequately be assessed as to prospects without hearing all of the evidence. Whilst the claims have not been pled as clearly as they might have been - there are references to that set out in the earlier Judgment which the respondent has referred to in its written application and oral submission, and that sense was not materially changed by the oral submissions made by the claimant, it does not follow that that means that there are little reasonable prospects of success.

(ii) As the case law has demonstrated there is a public interest in having such discrimination claims heard and determined on the evidence. I consider that in a marginal case (which this one is given the claims as pled and circumstances related to them) that is a factor that militates against making such an order.

(iii) The claimant is a party litigant. It is not entirely surprising that he has not pled the case as well as others might have done, or that his understanding of some of the concepts on which the claims proceed is imperfect if not at times lacking. These matters may however be clarified after hearing all the evidence. If a hypothetical comparator is relied on, for example, that is a matter of law, assessed from the evidence that is led. When giving his evidence he may be able to explain matters more effectively, and that evidence will include for example his answers to questions in cross examination, or from the Tribunal, which may cast a different light on the assessment of prospects possible at this stage. That may include the complaint he claims to have made at the salary review meeting, and why it was said to be a breach of the 2010 Act. The facts on which the claims under each of sections 13, 26 and 27 are said to be based may, and it can be put no higher, be relevant to each other. For example it may be

argued that the salary review meeting was a discussion that amounted to an allegation of breach of section 13.

(iv) It is not possible to know at this stage whether the burden of proof provisions in section 136 of the Act will be engaged, and if so at what point, but it is not beyond the possible that they may be. If they are, the burden passes to the respondent. At this stage it is very difficult indeed to assess whether or not the claimant will be able to establish a prima facie case which will engage those provisions.

(v) The claimant's financial circumstances are very limited indeed. He is unemployed on an income that is already limited for someone with a wife and four children to support, one of whom is shortly to attend University. The family income is to reduce materially. It is hard to see on the basis of the figures for income and outgoings how the family will have sufficient for food and other essentials. It appears to me that the limited capital he has will be exhausted very quickly indeed because of that. Whilst it is competent to make a deposit at a nominal sum, even £1, I did not consider in all the circumstances that doing so was in accordance with the overriding objective.

(vi) Although this is a minor factor, the respondent has left it until very late in the day before making this application, which could have been made at the same time, and as an alternative to, the application for strike out. That strike out was originally considered on 15 April 2021 at the third Preliminary Hearing, having been made beforehand. The application has been made close to the commencement of the Final Hearing.

Conclusion

15. In all the circumstances I refused the application. For the avoidance of doubt that is not to say either

(i) that the claims or any of them do have reasonable prospects of success, but that the terms of Rule 39 as read with Rule 2 lead me to conclude that no deposit order is appropriate, or

(ii) that an application in respect of expenses under the provisions of Rule 74-84 by whichever party is successful at the Final Hearing. Whether or not to make any award will be a matter for the Tribunal, and this comment is not to be taken as indicating that it will, or will not, make any award. The respondent's position in relation to that is recorded above.

Employment Judge:	**A Kemp**
Date of Judgment:	**20 August 2021**
Date sent to parties:	**20 August 2021**