



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Neckles

**Respondent:** Oak Furniture Group Ltd t/a Oak Furniture

**Heard at:** Bristol (via CVP video On: 12<sup>th</sup> August 2021 link)

**Before:** Employment Judge P Cadney

**Representation:**

Claimant: Mr D Ibekwe  
Respondent: Mr A Willoughby

## PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claim is struck out as having no reasonable prospect of success.

### Reasons

1. This claim comes before the tribunal on the respondent's application that the claimant's claim should be struck out as having no reasonable prospect of success or that a deposit be ordered as a condition of the claimant being permitted to pursue it as it has little reasonable prospect of success.

### Facts

2. Although this hearing involves making no findings of fact there is in reality little or no dispute as to the facts underlying these claims.
3. The claimant is an official of the PTSC Union and is not an employee of, nor an applicant for employment by, the respondent. Between the end of July 2020 and the middle of August a dispute arose between the respondent, one of its employees (MZ) and the claimant. MZ was made the subject of disciplinary

proceedings. He requested to be accompanied by the claimant as his trade union representative. The respondent refused to permit the claimant to represent MZ for reasons set out in a series of emails the claimant has set out in his particulars of claim. These are reasons personal to the claimant and the respondent contends that, as the emails show, that they were happy for MZ to be represented by an alternative trade union representative or work colleague. The disciplinary procedure went ahead with alternative representation. As I understand it MZ was subsequently dismissed and has brought a claim, which relates in part to the refusal to allow him to be represented by the trade union representative of his choice, which has yet to be heard.

### Claims

4. The claimant alleges that the refusal to permit him to accompany MZ, and/or the communication of that fact results in the following claims :
  - i) Breach of the Employment Relations Act 1999 (Blacklist ) Regulations 2010 Regs 3 and 9.
5. In his claim form it is not entirely clear whether the claimant was making a claim under the provisions of the Employment Relations Act 1999 itself. However Mr Ibekwe has confirmed that the only claim is brought pursuant to the regulations.
6. At 2.1.1 of Particulars of Complaint the claimant alleges that the respondent “..issued or publicised or provided a list which contained the detail of the claimant and which expressly and/or impliedly backlisted the claimant as a trade union representative or as an individual carrying out his duties / responsibilities / functions on behalf of the legitimate members of his Trade Union PTSC whom is/are employed by the Respondent employer.” He goes on to allege (2.1.2 / 2.1.3) that the “blacklist” contravenes regulations 3 and 9 of the regulations.
7. The documents alleged individually or collectively to comprise the “blacklist” were communications (in the main emails) sent to MZ dated 31<sup>st</sup> July 2020 / 4<sup>th</sup> August 2020 / 6<sup>th</sup> August 2020 / 11<sup>th</sup> August 2020, and to the PTSC union itself dated 6<sup>th</sup> August / 7<sup>th</sup> August 2020 /10<sup>th</sup> August 2020 which set out the facts of and the reasons for the respondent’s decision not to permit him to accompany MZ at the disciplinary hearing.

### Law

8. As a consequence the only law it is necessary to consider are the regulations, the relevant aspects of which are set out below:

#### **General prohibition**

**3.–(1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.**

**(2) A "prohibited list" is a list which–**

(a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and

(b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

....

### **Refusal of employment**

5.–(1) A person (P) has a right of complaint to an employment tribunal against another (R) if R refuses to employ P for a reason which relates to a prohibited list, and either–

(a) R contravenes regulation 3 in relation to that list, or

(b) R–

(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and

(ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.

(2) R shall be taken to refuse to employ P if P seeks employment of any description with R and R–

(a) refuses or deliberately omits to entertain and process P's application or enquiry;

(b) causes P to withdraw or cease to pursue P's application or enquiry;

(c) refuses or deliberately omits to offer P employment of that description;

(d) makes P an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted; or

(e) makes P an offer of such employment but withdraws it or causes P not to accept it.

(3) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that R contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless R shows that it did not.

### **Refusal of employment agency services**

6.–(1) A person (P) has a right of complaint to an employment tribunal against an employment agency (E) if E refuses P any of its services for a reason which relates to a prohibited list, and either–

(a) E contravenes regulation 3 in relation to that list, or

(b) E–

(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and

- (ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.*
- (2) E shall be taken to refuse P a service if P seeks to make use of the service and E—*
  - (a) refuses or deliberately omits to make the service available to P;*
  - (b) causes P not to make use of the service or to cease to make use of it; or*
  - (c) does not provide P the same service, on the same terms, as is provided to others.*
- (3) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that E contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless E shows that it did not.*

**Time limit for proceedings under regulation 5 or 6**

- 7.—(1) Subject to paragraph (2), an employment tribunal shall not consider a complaint under regulation 5 or 6 unless it is presented to the tribunal before the end of the period of three months beginning with the date of the conduct to which the complaint relates.*
- (2) An employment tribunal may consider a complaint under regulation 5 or 6 that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.*
- (3) The date of the conduct to which a complaint under regulation 5 relates shall be taken to be—*
  - (a) in the case of an actual refusal, the date of the refusal;*
  - (b) in the case of a deliberate omission—*
    - (i) to entertain and process P’s application or enquiry, or*
    - (ii) to offer employment,**the end of the period within which it was reasonable to expect R to act;*
  - (c) in the case of conduct causing P to withdraw or cease to pursue P’s application or enquiry, the date of that conduct;*
  - (d) in a case where R made but withdrew an offer, the date R withdrew the offer;*
  - (e) in any other case where R made an offer which was not accepted, the date on which R made the offer.*
- (4) The date of the conduct to which a complaint under regulation 6 relates shall be taken to be—*
  - (a) in the case of an actual refusal, the date of the refusal;*
  - (b) in the case of a deliberate omission to make a service available, the end of the period within which it was reasonable to expect E to act;*
  - (c) in the case of conduct causing P not make use of a service or to cease to make use of it, the date of that conduct;*

*(d) in the case of failure to provide the same service, on the same terms, as is provided to others, the date or last date on which the service in fact was provided.*

### **Detriment**

**9.**—(1) *A person (P) has a right of complaint to an employment tribunal against P's employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either—*

*(a) D contravenes regulation 3 in relation to that list, or*

*(b) D—*

*(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and*

*(ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.*

*(2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless D shows that it did not.*

*(3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning in Part 10 of the Employment Rights Act 1996.*

### Application

9. The respondent submits that the claimant has no standing to bring any claim under the Employment Relations Act itself and/or the blacklisting regulations made pursuant to it. In summary:
- i) Regulation 9 contains rights of an employee not to suffer a detriment as a consequence of the application of a prohibited list. As the claimant is not and never has been either an employee nor an applicant for employment of the respondent he has no standing to bring the claim.
  - ii) The communications do not in any event constitute a prohibited list/blacklist. They relate solely to one individual (the claimant) and to his representing a union member and not to employment or prospective employment. They do not therefore engage the regulations or fall within the situation the regulations are intended to prohibit.
  - iii) Even if the written communications constitute a blacklist the claimant suffered no detriment as consequence of its existence as it reflected a decision already made not allow him to represent MZ;
  - iv) In any event whilst this might arguably be a detriment for MZ (see below) it cannot be a detriment for the claimant, as the only consequence is his non-participation in MZ's disciplinary hearing.

- v) An identical claim has already been decided against the claimant.
10. The essence of the respondent's submission is that the claimant expressly relies upon a breach of regulation 9 but that it is impossible for him to bring himself within its provisions and the claim is bound to fail. As a result of the way the claimant puts his case today it is not necessary to deal with all the points set out above.
11. Similar proceedings -I have been provided with the pleadings and judgement in claim 3312731/2020 brought by the claimant (together with the PTSC Union whose claim was also struck out) against Abbeyfield Society t/a Abbeyfield. It was struck out as having no reasonable prospect of success by EJ Quill in a judgment given on 8<sup>th</sup> June 2021. The judgment I have is simply the bare judgment and as I understand it full written reasons have not yet been received. This decision would not be binding on me, but of persuasive authority, but in the absence of written reasons I do not know the basis of the strike out. The significance, the respondent alleges, is that having lost the straightforward argument that he is protected by the blacklisting regulations in one tribunal that the claimant understands that the claim as originally pleaded is doomed to failure and so has constructed the more arcane argument set out below.
12. Claimant's Submissions – The argument advanced before me by Mr Ibekwe is as follows:-
- i) He accepts that the claimant has no freestanding right to bring a claim under the regulations but asserts that he does have a right to bring a claim in conjunction with MZ.
  - ii) MZ has a claim before the London South tribunal which has yet to be heard. Accordingly Mr Ibekwe invites the tribunal not to strike out this claim but to permit it to proceed and to join the two claims (in whichever region).
  - iii) He contends that if the claimant has as a matter of fact been blacklisted within the meaning of the regulation 3, that even if he is not an employee of the respondent and therefore has no freestanding right of action pursuant to regulation 9; that MZ would have suffered a detriment for which he (MZ) could and should be compensated. In the hearing I questioned the concept of the transferred detriment to which Mr Ibekwe contended that he was not relying on the transfer of the detriment, which is and remains that of MZ being denied the representative of his choice, but which is itself dependant on the blacklisting of the claimant.
13. The essence of the submission, as I understand it, is that the claimant accepts that the person blacklisted (himself) has suffered no detriment; and the person who had suffered the detriment (MZ) is not the subject of the blacklist. However, as the purpose of the regulations is to prohibit blacklisting that end will only be achieved if this claim is allowed to proceed, and the claimant and MZ are permitted to join their claims and link the blacklisting and the detriment.

14. Mr Willoughby submits that whilst this may have the merit of creativity it no more discloses a justiciable claim in the employment tribunal than the originally pleaded claim of a freestanding right of action under the regulations. He contends that the essential flaw in the argument remains, in that there is no freestanding right to a declaration that the claimant has been blacklisted (even assuming that he has). Put simply the claimant has no right to bring a claim whether on his own or with anyone else unless he can bring himself personally within the ambit of the regulations. Where, even on his own admission he has no freestanding claim, he cannot create one by linking his claim with another claimant who has a different claim under the separate provisions of the Employment Relations Act 1999 itself. His claim remains doomed to failure and must be struck out as it necessarily has no reasonable prospect of success.
15. The first question me before therefore me is whether it is arguable that the refusal to permit the claimant to accompany a member of the trade union of which he is an official at a disciplinary hearing and/or to communicate that refusal falls within the protection granted by the regulations at all, and if it arguably does whether that argument has little reasonable prospect of success in which case I should consider ordering a deposit.
16. I bear in mind the definition of a prohibited list within the meaning of reg 3(2) is a list that contains “*..details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions*” and is compiled ““with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers” (my underlining)”. In my judgement it is extremely difficult for the communication of a refusal to permit the claimant to accompany a member of the union at a disciplinary hearing to fall within the underlined description. It is notable that the claimant’s own definition (as set out at para 6 above) is that the purpose of the list is to prevent him from carrying out his duties as a trade union representative which does not appear to fall within the statutory definition.
17. In addition Prohibitions set out in regs 5 and 6 relate to the refusal of employment and/ or employment agency services; and the calculation of time as set out in Reg 7 is primarily the date of actual refusal to offer employment/employment agency services and/or the date of the omission to entertain or process an application (and other similar formulations). All of the regulations therefore contain a consistent pattern of enforcing the prohibition contained in Reg 3 in relation, in broad terms, to employment or prospective employment.
18. In my judgment the highest that any claim on the basis of the facts set out above can be put is that the use of a blacklist might arguably fall within the definition in Reg 3 (2) (b) “*.. in relation to the treatment of workers*”; and that if the communications are arguably within the definition of a prohibited list (which in my view is more problematic for the reasons set out at paragraph 16 above) that it might (just) be arguable that MZ could have a claim. However no such claim is before me; and the claimant expressly relies on regulation 9 to found his own claim. In my judgement the respondent must be right that he cannot bring himself within its provisions as the respondent was not his employer. In

those circumstances in my judgement the respondent must be correct and the claimant has not identified any cause of action in which the tribunal has jurisdiction under the regulations. On that basis in my judgement the claim has no reasonable prospect of success and I am bound to strike it out.

Employment Judge P Cadney  
Date: 23 August 2021

Judgment sent to the Parties: 30 September 2021

FOR THE TRIBUNAL OFFICE