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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103575/2020 (V)**

**Held via Cloud Video Platform on 3 December 2021**

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**Employment Judge M Brewer**

15 **Mr G Nash**

**Claimant  
In person**

20 **Argyll & Bute Council**

**Respondent  
Represented by  
Ms A Weaver, Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The judgment of the Tribunal is as follows:

1. The claimant's claims of victimisation are dismissed on withdrawal.
2. The claimant's claim for indirect disability discrimination is dismissed under Rule 37 of the Rule of Procedure 2013 as having no reasonable prospect of success.
- 30 3. The claims set out at paragraphs 35, 37, 38, 39 and 40 of the Reasons below shall proceed to a final hearing.

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## REASONS

### Introduction

1. This case was listed for an open preliminary hearing to consider the respondent's application to strike out some or all of the claims being pursued  
5 by the claimant. I had before me a copy of the Tribunal's file and in particular the order for the claimant to provide further particulars of his claims, his response to that order and the respondent's subsequent application for strike out.
2. It is not necessary for me to set out the procedural history of this claim given  
10 that there have already been several preliminary hearings dealing with various matters which adequately set out what has happened to date. However, despite those preliminary hearings the claimant was unable to sufficiently particularised his complaints in such a way that they would be understood by both the respondent and the tribunal ultimately hearing the claim. it was in  
15 that context that further particularisation was ordered.
3. Following receipt of the further particulars miss Weaver on behalf of the respondent produced a detailed set of written submissions seeking a strikeout of what she understood to be the extant claims being pursued by the claimant.
4. Having read the file and in particular the claimant's further particulars it was  
20 clear that there were a number of difficulties with the claimant's response to the order. These are first that the claimant had not clearly signposted what less favourable or unfavourable treatment he had suffered, nor had he specified in relation to his victimisation claims the protective act he relies upon and in general there was still a lack of detail over the applicable law to the  
25 particular factual allegation. For that reason, I spent the first part of the hearing going through the claimant's further particulars with him in order to determine what factual claims were being pursued and what the causes of action were in relation to those claims. I set these out below.

**Relevant law**

5. The material parts of the Tribunal Rules are as follows:

***“Striking out***

5 **37.—(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—**

**(a) that it is scandalous or vexatious or has no reasonable prospect of success...**

**Direct disability discrimination**

10 6. In relation to direct discrimination, for present purposes the following are the key principles.

7. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

8. Given the treatment must be “less favourable” a comparison is required, and a comparator must “be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class” (**Shamoon** above).

20 9. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

10. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.
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11. In **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.
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12. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).
13. As well as direct disability discrimination the claimant also seeks to pursue claims for indirect disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability. The claimant intimated he was making a claim for victimisation but for the reasons set out below that is no longer the case. Finally, the claimant is making a claim for breach of contract
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### **Section 15 Equality Act 2010 (EqA)**

- 20 14. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:
- a. A treats B unfavourably because of something arising in consequence of B's disability, and
  - b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
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15. Section 15(2) goes on to state that '[S.15(1)] does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.' In other words, if the employer can establish that it was unaware — and could not reasonably have been expected to know — that the

claimant was disabled, it cannot be held liable for discrimination arising from disability.

16. In **Secretary of State for Justice and anor v Dunn** EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:
- a. there must be unfavourable treatment
  - b. there must be something that arises in consequence of the claimant's disability
  - c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and
  - d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.
17. The EHRC Employment Code indicates that unfavourable treatment should be construed synonymously with 'disadvantage'. It states: 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably' — para 5.7.
18. In **Pnaiser v NHS England and anor** 2016 IRLR 170, EAT, Mrs Justice Simler considered the authorities, and summarised the proper approach to establishing causation under S.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is

irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

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19. The distinction between conscious/unconscious thought processes (which are relevant to a tribunal's enquiry on a S.15 claim) and the employer's motives for subjecting the claimant to unfavourable treatment (which are not) was described by Simler J in **Secretary of State for Justice and anor v Dunn** EAT 0234/16 in the following terms: '[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability... [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary'. The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

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20. In **Hall v Chief Constable of West Yorkshire Police** 2015 IRLR 893, EAT, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment.

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### Harassment

21. Three forms of behaviour are prohibited under S.26 EqA, which is entitled 'Harassment':

- a. 'general' harassment, i.e. conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1);
  - b. sexual harassment — S.26(2); and
  - 5 c. less favourable treatment following harassment — S.26(3).
22. The general definition of harassment set out in S.26(1) applies to all protected characteristics except marriage and civil partnership and pregnancy and maternity. It states that a person (A) harasses another (B) if:
- 10 a. A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a); and
  - b. the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).
23. There are three essential elements of a harassment claim under S.26(1):
- 15 a. unwanted conduct;
  - b. that has the proscribed purpose or effect; and
  - c. which relates to a relevant protected characteristic.

### **Failure to make reasonable adjustments**

24. Section 20 EqA states that the duty to make adjustments comprises three
- 20 requirements:
- a. a requirement, where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage —
  - 25 S.20(3)

- b. a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage — S.20(4)
  - 5 c. a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid — S.20(5).
- 10 25. In the case of an employer, a ‘relevant matter’ for the above-mentioned purposes is any matter concerned with deciding to whom to offer employment and anything concerning employment by the employer — para 5, Sch 8.
- 15 26. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA, the Court of Appeal held that the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.
27. It is no part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made (**Tarbuck v Sainsbury’s Supermarkets Ltd** 2006 IRLR 664, EAT).

20 **Indirect disability discrimination**

28. The definition of indirect discrimination is contained in S.19 EqA. All four conditions in S.19(2) must be met before a successful claim for indirect discrimination can be established. That is:
- 25 a. there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant;
  - b. that PCP must put people who share the claimant’s protected characteristic at a particular disadvantage when compared with those who do not share that characteristic;



- c. the claimant must experience that particular disadvantage; and
- d. the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

### Strike out

- 5 29. Turning to the strike out provisions of the Rules, I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no reasonable prospect of success, even if there are
- 10 factual disputes.
30. Having said that, I note that I should, when considering strike out, take the claimant's pleaded case at its highest however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am
- 15 not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.
31. Caution should be exercised if a case has been badly pleaded, for example, by a litigant in person whose first language is not English. Taking the case at its highest may well ignore the possibility that it could have a reasonable
- 20 prospect of success if properly pleaded. In **Mbiusa v Cygnet Healthcare Ltd** UKEAT/0119/18 (7 March 2019, unreported) it was held that in view of the lack of clarity as to the claimant's arguments, the proper course of action would be to establish more precisely what the claimant was arguing, if necessary make amendments and then, if still in doubt about chances of
- 25 success, make a deposit order. At paragraph 21 Judge Eady provided useful guidance about the problem of imprecise pleading, particularly by litigants in person, as follows:

30 "Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the

ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in *Hassan* – the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

32. Particular caution needs to be exercised before striking out a discrimination claim without a hearing where, even though the primary facts may not be in dispute, there is nevertheless a dispute about the inferences to be drawn from them. As Simler J explained in *Zeb v Xerox (UK) Ltd* UKEAT/0091/15 (24 'the question of what inferences to draw forms part of the critical core of disputed facts in any discrimination case' (para 21), as do the respondent's explanations for alleged less favourable treatment (para 23); accordingly, employment judges need to be alert to the possible inferences that might be drawn and the lines of enquiry that will need to be pursued at a hearing before striking out such claims.

### Claims

33. I spent some time explaining the various types of claim which the claimant could make under the Equality Act 2010. This was necessary because the claimant had been ordered to set out the "causes of action" which he was relying upon which I took to mean the legal provisions upon which his claims were based and although he had put his claims under the various headings it seemed clear to me upon reading his further particulars that he had mislabelled a number of claims.

34. Having gone through that exercise the claimant is seeking bring to the following claims.

35. Direct disability discrimination:

- a. The respondent changed the claimant's line management;
- b. This was less favourable treatment because of a disability.

36. Indirect disability discrimination:

- 5 a. The respondent applied a PCP which was that line managers must manage those for whom they are managerially responsible;
- b. The claimant and a member of staff who was particularly difficult to manage and he says that the PCP put those with the disability of stress at the particular disadvantage of being unable or less able to manage  
10 such staff members; and
- c. The claimant was in fact unable to manage the particular staff member in question.

37. Discrimination arising from disability:

- 15 a. The claimant says that the something arising in consequence of his disability was his inability to manage a particularly difficult individual in his team;
- b. The claimant says he was required to continue to manage the individual referred to above; and
- 20 c. The claimant says that this amounted to unfavourable treatment because of his inability to manage the individual, which is the something arising.

38. Failure to make reasonable adjustments:

- a. The respondent applied a PCP which was that line managers must manage those for whom they are managerially responsible;
- 25 b. The substantial disadvantage was the inability to manage particularly challenging employees;

c. The respondent failed to make reasonable adjustments as follows:

- i. Not having the individual managed by somebody else;
- ii. Not following the recommendations of occupational health and other medical advisors; and
- 5           iii. Not following the respondent's policies and procedures with respect to the claimant's absence.

39. Harassment:

a. The claimant says that the following amounted to acts of harassment related to disability:

- 10           i. Changing his line management;
- ii. Sharing an occupational health report with what the claimant refers to as his quasi-line manager.

40. Breach of contract:

15           a. The claimant says that the respondent's failure to follow its procedures for attendance reviews amounted to a breach of contract as a result of which the claimant went into half pay and he is therefore entitled to damages in respect of the difference between full pay and half pay for the period between the time he went into half pay and the termination of his employment.

20   41. The claimant withdrew all his victimisation claims.

### **Respondent's application**

42. I shall deal first with a matter raised by Ms Weaver in relation to the claimant's harassment claims. As well as the claims I have set out above, the claimant also indicated he was making the following two claims of disability related  
25           harassment:

- a. Refusing to allow the claimant to return to work on 24 August 2020 without a fit for work note; and
- b. Trying to force the claimant to meet with the quasi-line manager in late August 2020.

5 43. Ms Weaver pointed out that these claims were not set out in the claim form and amount to an amendment in respect of which there has been no application to amend the claim. Mr Nash agreed He said that he had added them in but that it was not his intention to sneak in new claims. I have therefore not included those in the list of claims because should Mr Nash wish to pursue them, he must do so by way of an application to amend the claim.

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44. Turning to the application to strike out, this was contained in a four-page document headed “submissions” which Ms Weaver was content to rely upon and which of course I have considered.

15 45. The submissions are essentially a mixture of the fact that the claimant has failed to fully particularised a number of his claims in accordance with the order that he do so, that it was unclear which provisions of the Equality Act were being relied upon in a number of cases and that The respondent did not have “fair notice” of those claims which had been poorly pleaded or which had not been properly particularised. In effect the respondent’s submission is that the lack of factual clarity, the lack of specification and the lack of legal clarity means that claims have no reasonable prospect of success. so for example at paragraph ‘B’ of the submissions the respondent complains that the section 15 claims have not been specified sufficiently and then says:

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25 *“the respondent is entitled to fair notice of the claim. These paragraphs do not give fair notice of any claim under this section of the Act. Any claim under section 15 of the EA 2010 should be struck out as it has no reasonable prospects of success”*

46. I cannot accept the broad proposition that all of the claimants claims lack sufficient particularity either for the respondent to understand the case it has to meet or for the Tribunal dealing with the merits of the claims to understand the issues it has to respond to. For example, although the claimant has not identified the date his line management was changed, the respondent, having made the change, will no doubt already know when that took place that does not seem to me to be sufficient reason to take the draconian step of striking out an entire claim furthermore having set out the claims which are being pursued it should be relatively simple for the respondents and the claimant to put dates on matters should that be necessary.
47. The submissions do not specifically make an application to strike out any of the claims because of the claimant's failure to comply with the order to provide further details of his claims but even if it did, I would not be minded to strike out any of the claims for that reason. I note the decision of the Employment Appeal Tribunal in the case of ***Mbiusa v Cygnet Healthcare*** which says that *caution should be exercised where cases have been badly pleaded, in this case by somebody who is not legally qualified Dealing with, in some cases, quite complex areas of law which occasionally challenge the legal profession. In my judgement the claimant has done his best to set out his factual claims albeit that he has not been focused solely on that and has tended to draft in a way which seeks to over-explain the basis of and background to his claims rather than simply stick to the essential point of each allegation.*
48. That leaves the respondents application to strike out the claims because they have no reasonable prospect of success.
49. I can in fact deal with this application quite shortly. I keep in mind two essential principles in respect of this area of practise. The first is that in many cases and this is clearly one of them in my judgment issues of fact will arise which can only be determined after hearing evidence and having made appropriate inferences from primary findings of fact. The second is that I must take the claimant's case at its highest.

50. In relation to harassment, what the claimant says is that the insistence that he manage a particular individual in his team who was a source of considerable stress for him, and the sharing of an OH report with what he calls the quasi-line manager are clearly capable of amounting to harassment simply on the basis that the matters complained of relate to the claimant's stress which of course is his disability. I do note that there is a particular difficulty with the prospect of both harassment allegations succeeding. The claimant accepts that it was appropriate for the respondent to share the occupational health report with his line manager. His first allegation is that his line manager was changed. His second allegation is that the occupational health report was then shared with that replacement line manager, but the claimant also refers to him as a quasi-line manager suggesting that he was not in fact the correct or proper line manager. But if the first allegation succeeds, that is that the claimants line manager was in fact changed then the sharing of the occupational health report with that person was appropriate and the second allegation must fail. If the first allegation fails because the line manager was not in fact changed then the second allegation could succeed if it was not appropriate to share the occupational health report with this third person. This will require considerable fact finding and I am not in a position and indeed should not do that today. Therefore, I cannot say that such a claim has no reasonable prospect of success

51. Furthermore, assuming the claimant's line management was changed, and assuming as the claimant asserts that this was done in order that a tougher manager was required to manage him and implicitly manage him out, that is clearly an arguable case of direct disability discrimination. I am not in a position to say that such a claim has no reasonable prospect of success.

52. Likewise, and again taking the claimants case at its highest, assuming he can show that the PCP he alleges was applied and caused him a substantial disadvantage as he sets out then there is no reason to suppose that a tribunal could not find that the duty to make reasonable adjustments was engaged and that they respondent failed to make reasonable adjustments. I certainly

am not in a position to say that such a claim has no reasonable prospect of success.

53. In relation to the section 15 claim, while I consider that such a claim is not straightforward, it may be possible for the claimant to show that his inability to manage or manage appropriately as required by the respondent was the something arising from his disability and that therefore the requirement that he managed the individual who caused him difficulty was unfavourable treatment because of that something arising. Again, I cannot say that such a claim has no reasonable prospect of success.

54. In relation to the breach of contract claim, again putting the claimants claim at its highest, if the respondent's policies are contractual, and if they were not followed and therefore the respondent was in breach of contract, that may well have given rise to the loss which the claimant asserts. Again, at this point I am not in a position to say that such a claim has no reasonable prospect of success.

55. I do have some difficulty with the claimant's indirect disability discrimination claim. The claimant's assertion is that the requirement that he as a manager manages his staff was applied to everyone but that the requirement had a disproportionate adverse effect on those who share his disability being stressed. My judgement is that the claimant will have an insurmountable difficulty ensuring the group disadvantage required by the legislation. It is a bold assertion to say that everyone who has stressed which amounts to a disability would have difficulty managing difficult people. Stress affects people differently and I am not aware of any evidence which could be relied upon to show that in general people who are disabled by reason of stress cannot or have difficulty managing difficult people. I do not say that it is impossible but in my judgment there is no reasonable prospect of such a claim succeeding and therefore that claim should be struck out.



**Further procedure**

56. The Tribunal will contact the parties separately about A case management hearing to deal with listing the case and making any necessary case management orders to prepare the case for hearing.

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Employment Judge: Martin Brewer  
Date of Judgment: 03 December 2021  
Entered in register: 13 December 2021  
and copied to parties

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