

# EMPLOYMENT TRIBUNALS



**Claimant:** Mr Francis Morris  
**Respondent:** Emico Limited  
**Heard at:** Watford Hearing Centre  
**On:** 26 & 27 August 2021 and 16 September 2021  
**Before:** Employment Judge G Tobin  
Mr I Bone  
Mr S Bury

## Appearances

For the claimant: Mr S Brittenden  
For the respondent: Mr S Sanders

## JUDGMENT

It is the unanimous judgement of the Employment Tribunal that:

1. The claimant was not refused employment by the respondent in breach of s137 Trade Union & Labour Relations (Consolidation) Act 1992
2. The claimant was not refused employment under regulation 5 of the Employment Relations Act 1999 (Blacklists) Regulations 2010.
3. The claimant not being successful, proceedings are now dismissed.

## REASONS

The case and the issues to be determined

4. The complaints were summarised by Employment Judge Wyeth following the hearing of 3 April 2020. Judge Wyeth set out an agreed list of issues as follows:

I. Refusal of employment – s137 Trade Union & Labour Relations (Consolidation) Act 1992 (“TULRCA”)

- a. Was the respondent aware of the claimant’s trade union membership?
- b. Did the respondent refuse or deliberately omit to offer the claimant employment because of his trade union membership?

Insofar as it is relevant (and it is most likely a potential point for submissions), the claimant relies upon a purposive approach being applied to the interpretation of s137 TULRCA and the meaning of “membership”, in accordance with *Jet2Com Ltd v Denby* [2019] IRLR 417.

II. Refusal of employment (Blacklisting) – r5 ERA (Blacklists) Regulations 2010

- a. Are there facts from which the Tribunal could conclude, in the absence of any other explanation, that the respondent complied, used or knowingly (i.e. knew or ought reasonably to have known) relied on a prohibited list (i.e. a list containing details of persons who are taking or have taken part in trade union activities, with a view to the list being used by employers or employment agencies for the purposes of less favourable treatment on the grounds of trade union activities)?
- b. Did the respondent refuse or deliberately omit to offer the claimant employment for a reason which relates to a prohibited list compiled or used by the respondent?
- c. Did the respondent refuse or deliberately omit to offer the claimant employment for a reason which relates to:
  - i. reliance by the respondent on information supplied by a person who compiled, used, sold or supplied a prohibited list, and
  - ii. did the respondent know all ought reasonably to have known information relied was from a prohibited list?

5. III. Remedies

- a. If the claimant succeeds, in whole or part, the Tribunal will be concerned with the issues of remedy.

**The law**

6. Section 137 of Trade Union & Labour Relations (Consolidation) Act 1992 (“TULRCA”) says:

- (1) It is unlawful to refuse a person employment—
  - (a) because he is, or is not, a member of a trade union, or
  - (b) ...
- (2) A person who is thus unlawfully refused employment has a right of complaint to an employment tribunal.
- (3) ...

- (4) ...
- (5) A person shall be taken to be refused employment if he seeks employment of any description with a person and that person—
  - (a) refuses or deliberately omits to entertain and process his application or enquiry, or
  - (b) causes him to withdraw or cease to pursue his application or enquiry, or
  - (c) refuses or deliberately omits to offer him employment of that description, or
  - (d) makes him 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 him an offer of such employment but withdraws it or causes him not to accept it.
- (6) ...
- (7) ...
- (8) ...

7. Regulation 3 of the Employment Relations Act 1999 (Backlisting) Regulations 2010 deals with a general prohibition:

- (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.
- (3) “Discrimination” means treating a person less favourably than another on grounds of trade union membership or trade union activities.
- (4) In these Regulations references to membership of a trade union include references to—
  - (a) membership of a particular branch or section of a trade union, and
  - (b) membership of one of a number of particular branches or sections of a trade union;and references to taking part in the activities of a trade union have a corresponding meaning.

8. A “prohibitive list” is supposedly defined in Regulations 2 and 3(2). This requires a expansive definition and we interpret *Miller v Interserve Industrial Services Ltd [2013] ICR 445 EAT* as including a mental list. The Blacklisting Regulations do not define “*the activities of trade unions*” or “*trade union activities*”. We should define this in accordance with its plain and natural meaning and also so as to comply with the Human Rights Act 1998. “Activities of trade unions” and “trade union activities” are synonymous.

9. It is logical and uncontroversial that membership of a trade union is given a wide or purposive interpretation and includes participation in a range of duties and activities on behalf of the trade union or its members: see *Jet2.com v Denby [2018] ICR 597*.
10. Regulation 5 of the Blacklisting Regulations deals with the refusal of employment:
  - (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.

### The witness evidence

11. The parties provided agreed bundle of 377 pages. Many of the documents were duplicated. We (i.e. the Tribunal) read the witness statements and a number of documents in advance of hearing the witnesses. The Employment Judge made it clear at the outset that the Tribunal does not read Hearing Bundles as a matter of course, but we will read all documents directly referred to in the witness statement or during the course of the hearing. If a document was important then it was incumbent upon a representative, party or witness to draw this document to our attention.

12. We heard evidence from the claimant and Mr Andrew Williams and Mr Steven Myers. Mr Guv Sandhu gave evidence on behalf of the respondent. Each witness confirmed their witness statement. Counsel for the opposing side cross-examined each witness and we asked some questions for clarity. Each representative was then afforded the opportunity to re-examine their witness.

### **Our findings of Fact**

13. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.
14. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We addressed whether we should draw inferences on the absence of obviously relevant documents that we expected to see as a contemporaneous record of events. This may be relevant where no satisfactory explanation was given for the non-production thereof. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard the witnesses' statements with a little circumspection as both memories fade and the accounts may reflect a degree of misremembering or re-interpretation.
15. On 9 May 2018 Mr Andy Williams wrote to Mr Ray Higgins from SOS Holdings Limited with a grievance about an unrelated matter. The grievance was copied to 4 trade union officials at unitetheunion.org. Of the 4 trade union representatives, the claimant was second on the list. The grievance was forwarded to Mr Sandhu, the respondent's Head of Human Resources and Business Improvement, on 14 May 2018 [Hearing Bundle page/HB123].

16. Mr Williams' grievance meeting proceeded on 22 May 2018. Prior to the meeting commencing, the attendees, including Mr Sandhu and Mr Williams and Mr Myers, were chatting. The name of "Frank Morris" (i.e. the claimant) came up during the course of this unrelated exchange. Mr Sandhu said in this meeting that he had heard of Frank Morris, and he asked questions about him. Mr Sandhu expressed a noteworthy interest in the trade union activities of Frank Morris. We accept Mr Brittenden's detailed submissions in respect of this meeting in its entirety (at paragraphs 21 to 26) based on the evidence of Mr Williams and Mr Myers. Mr Williams and Mr Myers were both credible and convincing witnesses. Their evidence was broadly similar. There was some minor inconsistency as may be understandable with the passage of time, with slightly differing perceptions and particularly in respect of the difficulty of trying to remember what was said in an unconnected exchange in May 2018 about a fellow trade unionist when Frank Morris was not the subject of the meeting. The accounts of Mr William and Mr Myers was at odds with Mr Sandhu's account. Mr Sandhu was not an impressive witness. His account was not clear and some of his answers were contradictory. We do not believe that he gave an accurate account of the gossip or discussions that occurred before Mr William's grievance hearing. Consequently, we reject Mr Sandhu's account of that meeting.
17. On 9 October 2018 Gerald Downing emailed a number of "Brothers and Sisters, Comrades and Friends" about a Grass Roots Left Relaunch [HB129-132]. This email contained information about left caucus within the trade union movement and in particular Unite. This document was disclosed by the respondent following the claimant's data and information request. The names of "Frank Morris" and "John Barry" appear on the circulation list with no address nor any further references to these 2 brothers, comrades or friends.
18. On 5 April 2019 (approximately 10½ months later) the claimant made a data or information subject access request to John Barry, the Group Managing Director of the respondent [HB158-159]. This email was submitted on a personal email address, and it referred to various possible search terms included references to blacklisting and Unite activism. Mr Sandhu responded to this subject access request with what appears to read as a fairly standard letter of *no personal data* on behalf of the respondent on 26 April 2019 [HB156-157]. The claimant asked again a few days later [HB156] and this further request identified further information on 2 May 2019, which Mr Sandhu said the Data Controller would forward [HB172]. The information discovered amounted to the document mentioned in the preceding paragraph above.
19. On 8 May 2019 the claimant sent an email to Trevor Wright, the respondent's Head of IT, in respect of "Re: Vacancies JIB approved electrician" [HB197-198]. The email stated as follows:

I'd like to apply for the position of JIB approved electrician on the Euston project.  
I understand you will have vacancies in the up and coming weeks on the project and would like to be considered for any suitable vacancies.  
I'd be thankful if you could pass this email to the appropriate HR or project manager who is responsible for recruitment onto the project.

20. The respondent had not advertised for any electricians' roles nor had the claimant worked for the respondent before. Therefore, the claimant's email was speculative and the claimant has not been able to provide any contemporaneous corroborative evidence as to why there might be vacancies on this project over the ensuing weeks.
21. Mr Wright copied the claimant into his email in which he forwarded the claimant's application to Mr Sandhu [HB196].
22. On 16 May 2019 the claimant wrote direct to Mr Sandhu and requested feedback on his request to be considered for a position of approved electrician on the HS2 Euston project [HB196]. Mr Sandhu responded the next day explaining to the claimant that the respondent was not engaged on a HS2 project, but a Network Rail funded contract. Mr Sandhu inform the claimant that they have candidates on "hold files" who were being contacted as and when the need arises, and he said he would like to retain the claimant's details and asked for his permission to do so [HB194-195].
23. Mr Sanders letter to the claimant was consistent with the respondent's Recruitment Process Permanent & Temporary policy [HB303-308]:

Hold Applications

There may be times where Emico receive speculative applications for a role, however no vacancy actually exists at that current time... Emico may contact the candidate and asked for their consent in retaining their details for any future vacancies that may arise... Should no consent be provided, the application will be archived and destroyed within 4 months  
For all applications that do not meet the criteria for the role, HR will endeavour to contact the candidate to advise them of this. Please note that this may not always be possible.

24. The claimant did not provide any consent for his details to be retained. The claimant did, however, complain about the respondent's recruitment strategy and an apparent non-adherence to the Joint Industry Board ("JIB") national working rules agreement. The claimant requested that this be dealt with through the respondent's grievance procedure [HB194], although there was no contractual obligation upon the respondent to do so.

**Determination**

25. We note the guidance in *Speciality Care v Pachela [1996] IRLR 248* about the need to *robustly* engage with the evidence. In addition, we remind ourselves that any inference we may draw must be based upon a clear evidential foundation. Inference is not speculation; it is a process of drawing a clear conclusion from the factual material available and the assessment of circumstances. An inference can be made where key evidence is absent in circumstance where it ought to be available. An inference should take matters to a logical and sustainable conclusion. It is a process of joining the dots on a route map. It is not an exercise in plotting a route through unmapped territory. The latter is guesswork or acting on a hunch and that should not play a part in our determination.

26. The claimant was a committed and active trade unionist. It is understandable that he was committed to support the national framework agreement which he contended minimised the use of agency workers. The claimant and Unite the union contended that the respondent sought to frustrate a national agreement about directly employing electrical contractors whereas the respondent pointed to an external audit and contended that there was nothing wrong with their recruitment practices for employees and contract workers for the Euston or any other project. It is neither the focus of this claim nor is it within the jurisdiction of the Employment Tribunal to determine whether or not the respondent's followed the agreed, or binding or appropriate recruitment practices of the JIB national agreement. Our focus is on determining whether the claimant was not offered employment by the respondent because of his trade union membership (or activities) and whether the respondent maintained a prohibited blacklist.
27. Although we do not find Mr Sandhu's account of the meeting of 22 May 2018 frank and honest, it does not necessarily follow that he lied in all other aspects of his evidence. Such a finding would be an inappropriate and, in this instance probably an unfair assumption. Mr Sandhu did not appear to be untruthful in any other aspect of his account. He may have misremembered the exchange of 22 May 2018, or he may have relayed a false narrative so as to downplay the link with the allegations of 1-year later. In any event, a dispute about gossiping about a Frank Morris 1-year before the claimant's job enquiry is too tenuous a link to reject all of Mr Sandhu's evidence.
28. It might also be helpful to state the obvious. We focus our assessment on *employment* vacancies – as opposed to contract work – as the claimant was clearly seeking the former (which has also been described as JIB approved work and PAYE work) as opposed to the less secure and less beneficial engagement as a contractor. This distinction was at the forefront of our analysis.
29. Paragraph 11 of the Amended Particulars of Claim asserts that the respondent/Mr Sandhu sought to circumvent direct-employment of the claimant by taking on agency workers in contravention of the JIB National Rules. This contention that the respondent altered its entire recruitment approach for the Euston Project so as to avoid the claimant's speculative employment application is not credible. The claimant's assertion of this employment-avoidance motive ignores the commercial or money-orientated logic of the respondent's recourse to contract workers for this site, which was the original driving force of the claimant's objections (and possibly his interest in the respondent company).



30. We are not persuaded that the claimant's fame (or possible notoriety) was so prominent. Mr Sandhu took an interest in the claimant's identity or profile approximately 1-year before the claimant's speculative job application. We accept Mr Sandhu's contention that the claimant's name is not so distinct that he instantly associated him with the trade union militancy of the early years Cross Rail project.
31. In any event, Mr Sandhu reply of 17 May 2019 [HB194-196] gives no indication of less favourable treatment on trade union grounds. The email is appropriate and consistent with the respondent's policy and the response of a reasonable employer.
32. Indeed, it would appear that by offering to maintain the claim's records on file as a "hold application", the claimant was treated in a manner consistent with other potential recruits both before and after the claimant's application/enquiry: (1) SAH's "speculative application" of 31 July 2019 at page 95 of the Hearing Bundle; (2) IM's speculative application of 22 April 2019 at page 166; (3) AW's application of 26 June 2019 at page 227; and (4) AK speculative application of 31 July 2019 at page 248; and (5) JS "employment opportunity for an electrician" of 17 July 2019 .
33. We determine that the claimant was not employed by the respondent because the respondent had no vacancies for employees. The respondent was not recruiting for JIB or otherwise directly-employed electrician. The respondent was not advertising for contract workers either and the claimant was not able to identify any advertisement for a employment position nor was he able to identify any vacancy for a contract worker.
34. In evidence Mr Sandhu said that the respondent did not employ any electricians on the Euston project in or around May 2019. He appeared to be consistent in his maintenance of this position in correspondence in November 2020 [HB79] and this also appeared to be consistent with the voluminous material provided in the hearing bundle which did not indicate either any employment vacancies for electricians or that anyone else was employed as an electrician during this period.
35. We deal with our findings on the meeting of 22 May 2018 above, this occurred such a long time before the claimant's application that we accept Mr Sandhu evidence that he did not associate the claimant's application from a private email address with the Frank Morris trade union activist discussed 1-year before. The subject access request is similarly tenuous and this does not support drawing an inference.

36. It is not clear whether Mr Barry was a brother, sister, comrade or friend so as to be in receipt of the email from Gerald Downing regarding the Grass Roots Left relaunch. Mr Barry did not attend the hearing to explain why the respondent had such an email on their system. However, in fairness to the respondent we are not persuaded this was part of the claimant's case until the hearing. So, although the disclosure of this document might raise some questions for us, its value in supporting a conspiracy against perceived trade union trouble-makers is limited. The outlook of this flyer is more political than orientated towards industrial militancy. As a single piece of documentary evidence, we are not going to draw any adverse inference that this document was used for nefarious reasons. We need more to persuade us.
37. The claimant did not have any contractual or other right to pursue a grievance. So other than inferring that Mr Sandhu was rude to ignore the claimant's complaint of 20 May 2019 and chasing reply of 24 May 2019, we discount this relevance.
38. Mr Jerry Swain, the National Officer Construction for Unite wrote to the respondent regarding a possible vacancy for the claimant and received a response from Mr Sandhu on 17 July 2019 stating that the respondent were not recruiting at the current time and were, in fact, reducing the number of electricians as projects were in the course of completion. This appeared to be a contemporaneous account which confirms the consistency of the respondent's position at the Tribunal, and it also appeared to be consistent with the other documents. It is not, as Mr Brittenden puts it evidence of any animosity to the claimant at all.
39. We note that the claimant makes criticism of the respondent's disclosure and, indeed, we see that this appears a little threadbare. If the respondent was in breach of a Tribunal order in respect of disclosure, then we would consider drawing such inference but not on the basis that the respondent could have done better. This falls far short of providing a clear evidential basis of inferring that there was employment available (or even merely work opportunities available).

40. Mr Sandhu and the respondent were, of course, aware of the claimant's trade union membership at the hearing. We are not convinced that at least as far as 17 May 2019 and possibly beyond Mr Sandhu associated the claimant with the trade union activist that was discussed on 22 May 2018. There is nothing to support the contention that Mr Sandhu had a mental blacklist of individuals to refuse employment and we note that he treated the claimant exactly in accordance with the policy and substantially the same as 5 identified applicants around that time. Even if Mr Sandhu knew that the claimant was a committed trade union activist, the claimant was not offered employment because there was no work available. And this applies to contract work also, notwithstanding the claimant did not appear to want contract work. Under the circumstances the claimant's case under s137 TULRCA is rejected.
41. The position is largely the same for the claimant's backlisting case. There are no facts from which we can conclude that the respondent knew, used or relied upon a prohibited list. Accordingly this claim fails also.
42. In summary, the claimant made a speculative application for employment, he was not offered employment because we are satisfied there was no job and no electrical contracting work available.

---

**Employment Judge Tobin**

Date: 17 January 2022

Sent to the parties on:  
18 January 2022

For the Tribunal: