Case Nos: 1803877/2021,
1803882/2021, 1804380/2021 &
1804384/2021

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr D Horrobin**
(2) Mr V Baker
Respondent: **Kirklees College**

Rules 29 and 72 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

JUDGMENT

The claimants' respective applications dated 12th, 14th and 26th January 2022 for reconsideration of the judgment sent to the parties on 7th January 2022, with written reasons on 24th January 2022 or for a review of the separate decision sent on 7th January 2022 to order deposits in the case of Mr Horrobin are all refused.

REASONS

There is no reasonable prospect of the original judgment being varied or revoked, and nor is it in the interests of justice to set aside the deposit orders because:

1. The preliminary hearing was conducted over a full day.

2. The applications are substantially a repetition of the oral arguments advanced on behalf of the Claimants, and already considered.

3. None of the cases referred to in the applications was in fact cited at the hearing.

4. In the case of Mr Baker I accepted that the raising of his concerns with management in respect of possible interference with his religious observance was potentially the doing of a protected act under section 27 (2) (c) (or perhaps (d)) of the Equality Act 2010 , or the making of a

protected qualifying disclosure under section 43 B (1) (b) of the Employment Rights Act 1996. The preliminary hearing therefore proceeded on the assumption that these elements of the claim would be established. It was not necessary, therefore, to consider what the evidence would be as to the precise terms of those disclosures. The presenting of the first tribunal claim, is also a protected act in any event, under section 27 (2) (a).

5. I fully appreciated that the making of a protected disclosure need not be the sole reason for any detrimental treatment in order for the claim to succeed in this regard.

6. Nor does the Claimant's protected characteristic of religion or belief need to be the sole reason for any detrimental treatment in order for a claim of direct discrimination claim to succeed.

7. Whilst the specific cases now cited (**Owen & Briggs v James** [on submissions of no case to answer] and **Sharma v Manchester City Council** [on claims under the Part-time Worker Regulations]) are not in fact directly in point, the principle in **Igen Ltd. V Wong [2005] IRLR 58** and subsequent cases is well-established and was taken into consideration.

8. Similarly if the making of a protected qualifying disclosure is a material factor in the subjecting of the Claimant to a detriment that will suffice for a claim under section 48 of the Employment Rights Act 1996. **Fecitt v NHS Manchester [2012] IRLR 64** is also well-established law and was taken into consideration.

9. In this case the uncontested factual background however means that there is no realistic prospect of either such a disclosure/protected act or the claimant's religion being held to form any material part of the reason for the alleged detrimental treatment. Where the restructuring process commenced long before any alleged disclosure, and where concessions had been made such that the claimant was never actually going to be required to work on Saturdays, there is no reasonable prospect of his even establishing the necessary primary facts from which it could be concluded that these were any part of the reason why the ultimatum was issued. In those circumstances the burden of proof would not fall on the respondent either under section 136 of the Equality Act 2010, or section 48 (2) of the Employment Rights Act 1996.

10. The evidence now put forward in the form of the respondent's actual "ultimatum" letter of 25th August 2021 in actual fact reinforces the context. It specifies that:
"we agreed to you finishing at 6pm on a Friday rather than 10pm, which will mean Daniel having to make some operational changes to the service to accommodate you. We also agreed as a reasonable adjustment that whilst we would still rota you in for the required number of Saturdays, you would be allowed to book these of as either annual leave or unpaid."
Even if it were appropriate to admit this fresh evidence at this stage it would,

therefore make no difference to the decision taken.

11. There is also therefore nothing, within this uncontentious factual context, to substantiate an alternative claim of harassment. The Claimant would still have to show primary facts from which it could be concluded that there had been unwanted conduct related to religion. In circumstances where he was never actually required to work in contravention of his religious convictions. Nor, on the face of it face of it would the accommodations made in the course of consultation objectively come close to meeting the threshold of harassment, even taking into account the alleged subjective perception of the Claimant. The application does not address any further issues which might cause the original decision to be varied.

12. The application does not identify any reason to challenge the decision that the separable parts of any disclosure that relate only to the private contractual provisions, and not also to any element of alleged discrimination, were not in the public interest. If, as I find on the uncontested facts, there is no reasonable prospect of a claim succeeding on the basis of a disclosure relating to a breach of the Equality Act, there is also no realistic prospect of a claim being upheld in relation to a concomitant disclosure without that obvious public element.

13. In the case of Mr Horrobin there is not now a challenge to the decision that the automatically unfair dismissal complaints under section 99 or 104A of the Employment Rights Act 1996, in so far as both refer to section 57A, should be struck out.

14. The complaints of protected qualifying disclosure detriment or automatically unfair dismissal in so far as they relate to allegations of associative disability discrimination may proceed subject to the payment of a deposit. Similarly in this case the application does not identify any reason to challenge the decision that the separable parts of any disclosure that relate only to the private contractual provisions, and not also to any element of alleged discrimination, were not in the public interest. If the assertion, which I consider to have little reasonable prospect of success, that the making of a disclosure in relation to alleged discrimination were not made out there is no reasonable prospect of a concomitant disclosure without that obvious public element being upheld in isolation.

15. The application in respect of claim of direct associative disability discrimination still does not identify any alleged primary facts from which it could, absent any explanation, be concluded that this was the reason why the Claimant w dismissed, so that the burden of proof would pass to the Respondent to show that it as “on no grounds whatsoever” because of the alleged disability of the Claimant’s wife or father-in law. There is no allegation made at all that (similar to the position in **Coleman v Attridge Law [2008] IRLR 722** or **Bainbridge v Atlas Ward Structures ET 1800212**) that the Respondent did anything other than be fully prepared to accommodate the Claimant’s pre-arranged absences to attend n medical appointments. Nor is there any history whatsoever of unexpected absences to care for dependents such as may have caused any resentment. Nor of course is this a case where the Claimant was selected to be dismissed in contra-distinction to another employee, where the inferred reason might have been his association with a disabled person.

16. I am well aware of the caution to be exercised in such a case (see **Ezsias v North Glamorgan NHS Trust [2007] ICR1126).** Nonetheless taking a realistic view of the circumstances of the case this complaint has no reasonable prospect

of success. The Claimant is not of course – subject to his paying the deposit – precluded form pursing his primary claim that he was subjected to a detriment or dismissed because he had done a protected act in relation to his alleged rights as a carer.

17. So far as the Deposit Orders are concerned, I remain of the view that looking at the relevant claims as a whole, and having regard to the likely evidence that will be heard in due course they have little reasonable prospect of success. It is not, therefore, necessary in the interests of justice to revoke the orders.

18. The one new matter which I can discern from the application, and to which I did not advert in the original decision, is that the issuing of the first claim is in itself the doing of a protected act. This claim was not however sent out by the tribunal until 4th August 2021, after the date of termination. Even if that claim (presented on 26th July 2021) was intimated to the Respondent before it was formally served, it would not affect my opinion that there is little reasonable prospect of this being held to be a material factor in the decision to dismiss. The Claimant may, of course, pay the deposit and present any evidence or arguments to contradict m provisional assessment under rule 39.

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Employment Judge Lancaster
Date 2nd February 2022