



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4102607/2022

Preliminary hearing held in Glasgow on 31 August 2023

Employment Judge M Whitcombe

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Mr A Elatabani

Claimant
In person

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Adecco UK Limited

First Respondent
Represented by:
Mr R Hayes
(In house lawyer)

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Amazon UK Service Ltd

Second Respondent
Represented by:
Mr R Dunn
(Counsel)

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JUDGMENT

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Neither of the remaining claims against Adecco UK Limited should be struck out as having no reasonable prospect of success and both will proceed to the final hearing already listed.

Deposits have already been ordered (and paid) in respect of both of them.

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REASONS

Introduction

1. Oral reasons were given during and at the end of the hearing so it is hoped
5 that concise written reasons will suffice for present purposes. If any party
requires full written reasons then they may of course apply for them.
Throughout the hearing today the claimant was assisted by Mr Al Sabbagh,
an interpreter of the Arabic language.

- io 2. This is the application of Adecco UK Limited (“Adecco”) for the remaining
claims against it to be struck out under rule 37(1)(a) on the basis that they
have no reasonable prospect of success. Unusually, this application follows
Adecco’s successful prior application for a deposit order in respect of those
15 (and other) claims. That order was made by EJ O’Donnell following a hearing
on 28 April 2023 and sent to the parties on 9 May 2023. The remaining claims
are the ones in respect of which the claimant paid the specified deposit. It
might have been more cost-effective and proportionate for Adecco to have
combined those applications given that both require a similar approach and
involve similar tests. The claimant fully understands the implications of the
20 deposit order and the risk of an award of expenses (or in England and Wales,
‘costs’) in Adecco’s favour if he is unsuccessful for substantially the same
reasons at the final hearing.

3. Following discussion and argument today, I decided that the claims should
25 not be struck out because in respect of each of them there was an argument
which had at least *some* reasonable prospect of success. I express no further
view about the merits, especially since another Employment Judge has
already decided that those claims have *little* reasonable prospect of success.
No one should misunderstand my decision today as an opinion that the claims
30 are strong or likely to succeed. In brief, my reasons are as follows.
 - a. The claim for direct age discrimination has some reasonable prospect
of success on the basis of “**Madarassy** factors” (i.e. matters from

which inferences of age discrimination might be drawn, sufficient to pass the burden of proof to the respondent). They are summarised below and Adecco's representative has agreed to incorporate them into the list of issues within 7 days of this judgment being sent to the parties.

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- b. The claim for notice pay appears hopeless if treated as a matter of pure contract, given the clear terms of clause 14 of the contract. However, it might not be a matter of pure contract and the following argument might be advanced on the claimant's behalf with some reasonable prospect of success. Sections 86, 89 and 224 of the Employment Rights Act 1996 might combine to give a right to statutory notice calculated on the basis of an average of the previous 12 weeks' earnings. Mr Hayes conceded for today's purposes that on the face of it the claimant had no normal working hours, especially given the terms of clauses 5 and 3 of the contract. The claim also therefore crosses the low hurdle necessary to avoid being struck out.

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The "Madarassy factors"

The basis on which the claimant alleges that his treatment was less favourable than that of a hypothetical comparator (and perhaps also that of the actual comparators) *because of age* has today been explained as follows: *younger colleagues were provided with additional shifts when they asked for them, whereas the claimant was not, younger colleagues received bonuses, whereas the claimant did not, even though he was working better and more efficiently than them. There was also a stereotypical assumption that younger workers would be better at IT than the claimant. Amazon employees referred to the claimant's birthday and were probably therefore aware of the claimant's date of birth, even though it was irrelevant to his work. The claimant had been asked for his date of birth when he started work, even though it was irrelevant. Adecco and Amazon acted as one, so it makes no difference that some of these things were done by Amazon employees.*

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Case management

5. The final hearing is currently listed to take place on **10, 11 and 12 October 2023**. I am not the allocated case management judge, but I raised with the parties whether it was realistic to expect this case to be completed fairly within 3 days, given that the claimant will represent himself and that the claimant's own evidence and his cross-examination of other witnesses will be conducted through an interpreter. Today it was thought that there might be up to 6 witnesses in total. Also, the issues and the scope of the evidence have now expanded a little since the final hearing was first listed.
6. The parties will consider their positions and write to the Tribunal by no later than **7 September 2023** giving their estimate of the time needed for a fair hearing, which should be agreed if possible. As part of that process they should also prepare a draft timetable for evidence by the same date. The allocated case management judge 'will then give directions if he agrees that the existing allocation of time is too short. It would be helpful if the parties could proactively discuss and, if possible, agree availability for a longer hearing if they decide that one is necessary, in those circumstances the most attractive option if possible would be to extend the current listing.
7. The existing direction for a joint file of documentary evidence remains in place. To that end, the parties have agreed that they will send each other the documents they intend to rely on by no later than **7 September 2023**.
8. As always, the parties are reminded of the need to work collaboratively to ensure a fair hearing at proportionate cost without unnecessary delay (rule 2) and that there are many ways of resolving a case without the need for a hearing (rule 3). Given the procedural history, the claimant should think very carefully about his options. There are many potential sources of free advice on employment law claims.

Employment Judge: M Whitcombe
Date of Judgment: 31 August 2023
Entered in register: 05 September 2023
and copied to parties

