EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110538/2019

Held in Glasgow on 7 August 2023

Employment Judge S MacLean

Mr Edward McClung	**Claimant** **In Person**
Altrad Babcock Limited	**First Respondent** **Represented by:** **Ms A Trainor - Trainee Solicitor**
NRL Limited	**Second Respondent** **Represented by:** **Mr D Livingstone - Director**
Donald Ross	**Third Respondent** **Represented by:** **Ms L Finlayson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondents' applications for strike out or a deposit order are refused.

REASONS

Background

1. In the claim form sent to the Tribunal on 2 September 2019, the claimant alleges unfair dismissal and breaches of section 13 (direct discrimination) and 26 (harassment) of the Equality Act 2010 (the EqA) on the grounds of religion or belief. The claim arises out of the claimant's engagement with the first

respondent through an employment agency, the second respondent and McClung Strategy and Projects Limited.

2. At a case management preliminary hearing on 10 January 2020 (the January 2020 PH) an Employment Judge ordered the case to be listed for a preliminary hearing on 24 March 2020 to decide whether any or all of the cfaims should be struck out as having no reasonable prospects of success or whether a deposit order should be made. The Employment Judge also advised that he was considering striking out the unfair dismissal claim without a hearing on the basis of no reasonable prospect of success unless the claimant provided written reasons why he should not or requested a hearing in which case the strike out of the unfair dismissal claim would be considered at the hearing on 24 March 2020.

3. The claimant subsequently raised other issues which have been considered. In addition to case management preliminary hearings there have been preliminary hearings on 10 September 2021 at which the claimant's application to amend to include a complaint under section 104 of the Employment Rights Act 1996 (the ERA) was refused; 13 September 2022 when the unfair dismissal claim was struck out; and 1 June 2022 when it was decided that supporting Rangers Football Club was not a philosophical belief.

4. At a case management preliminary hearing on 24 April 2023 it was confirmed that the only remaining issue before the Tribunal was the claim that there had been discrimination because of the protected characteristic of religion, being a Protestant Christian.

5. This preliminary hearing was arranged to determine the respondents' application for the claim to be struck out in terms of rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 201 3 (the ET Rules) or alternatively whether the claimant should be ordered to pay a deposit as the condition of proceeding with the claim in terms of rule 39 of the ET Rules.

6. The respondents had been ordered to send the claimant a bullet point summary of the basis of their applications which they did. While not ordered to so do, the claimant provided the respondents with a written reply.

The preliminary hearing

7. The preliminary hearing was conducted in public. Ms Trainor, Mr Livingstone and Ms Finlayson represented the first, second and third respondents respectively. The claimant represented himself.

8. Given that there was an alternative application for a deposit order, it was agreed that I should first hear evidence from the claimant about his ability to pay any deposit that might be ordered. The respondents were then invited to cross examine the claimant. Only Mr Livingstone took the opportunity to do so by seeking clarity about the fees that the claimant paid in order to participate in professional golf championships.

9. The respondents then addressed me on their written applications which had been copied to the Tribunal before the preliminary hearing. Ms Trainor provided more detailed written submissions to which she spoke. Ms Finlayson then adopted those submissions and made some supplementary points. Mr Livingstone adopted the submissions that had already been made. The claimant replied. The respondents were given an opportunity to make final comments in respect of any matters that had arisen that were not previously addressed in their submissions. I reserved judgment.

The law on strike out and deposit orders

10. Strike out of the claim or response is addressed in rule 37 of the ET Rules. Rule 37(1)(a) provides that at any stage of the proceedings, either on its own initiative or in the application of a party, a Tribunal may strike out all or part of the claim or response on the following grounds that it is scandalous or vexatious or has no reasonable prospect of success.

11. The relevant provision on deposit orders is contained within rule 39 of the ET Rules. This provides that where the Tribunal considers that any specific allegation or argument in the claim has little reasonable prospect of success,

it may make an order requiring the claimant to pay a deposit not exceeding £1,000 as a condition continuing to advance that allegation or argument.

12. Rules 37 and 39 require to be exercised having regard to the overriding objective in rule 2 of the ET Rules. This is to deal with cases justly and fairly which includes so far as practicable ensuring that the parties are on equal footing; dealing with the cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

13. The striking out process requires a two stage test (see *HM Prison Service v Dolby* [2003] IRLR 694). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires a Tribunal to decide as a matter of discretion whether to strike out the claim. Lady Wise said in *Hassan v Tesco Stores Limited* UKEAT/0098/16 that the second stage is important as it is a "fundamental cross check to avoid bringing to an end prematurely a claim that may yet have merit".

14. Special considerations arise where a Tribunal is asked to strike out a claim of discrimination. In *Anyanwu v South Bank Students Union* [2001] IRLR 305, the House of Lords highlighted that discrimination cases as a general rule should be decided after hearing the evidence. It is important not to strike out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.

15. It is competent to strike out a discrimination. In *Ahir v British Airways pic* [2017] ECWA Civ 1392 the Court of Appeal said that tribunals should not be deterred from striking out claims, including discrimination claims, which involve disputes of fact if they are satisfied that there is indeed no reasonable

prospect of the facts necessary to find liability being established provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored.

16. In *Mechkarov v City Bank NA* [2016] ICR 1121, the EAT summarised the law as follows:

a. only in the clearest cases should a discrimination claim be struck out;

b. where there are core issues of fact that turn on oral evidence, they should not be decided without hearing oral evidence;

c. the claimant's case must ordinarily be taken at its highest;

d. if the claimant's case was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it could be struck out;

e. a tribunal should not conduct an impromptu minitrial of oral evidence to resolve core disputed facts.

17. The EAT in *Kaul v Ministry of Justice & others* [2023] UKEAT held that the need for caution when considering a strike out application does not prohibit realistic assessment where the circumstances of the case permit. It was observed in this case that even if the claims were taken as true at face value, they would still inevitably fail at final hearing.

18. There are discrimination cases where the EAT upheld decisions to strike out the claims as having no reasonable prospects of success before any evidence. In *Croke v Leeds City Council* UKEAT/0512/07 after requiring the litigant in person to provide full particulars of his victimisation claim, the judge held there was no material from which the necessary causal link between the protected act and the council's alleged conduct coul d be identified. The judge therefore struck out the claims as having no reasonable prospect of success. The EAT upheld this decision and held that where on the available material, the judge considered that the case was "not in any ordinary sense of the term fact sensitive it could be struck out without evidence being formally heard."

19. In *Sivanandan v Independent Police Complaints Commission & others* UKEAT/0436/14, the EAT upheld a tribunal's decision to strike out part of the indirect discrimination claims on the basis even on the claims as pled as their highest, there was no reasonable prospect of establishing discrimination had occurred.

20. When considering claims made by those who are representing themselves, it is not sufficient only to consider the case as pled, but it is necessary to review all the material before the tribunal *(Morgan v DHL Services Limited* UKEAT/0246/19).

21. *Cox v Adecco & others* UKEAT/0339/1 9 contains a summary of the law as to strike out particularly where the claim is pursued by a litigant in person, as is the case here, is the risk of costs (expenses) if the claim failed. However, the purpose was not to make it difficult to access justice or to effect strike out by the back door. It emphasised that both parties have duties under the overriding objective and in respect of claimants said the following:

"So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their
- core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all possible claims and issues."

22. The EAT commented on the purpose of deposit orders in *Tree v Southeast Coastal Services Ambulance NHS Trust* UKEAT/0047/1 7. Where a case has deficiencies in the pleadings it is important that Employment Tribunals do not use deposit orders as a substitute for more appropriate case management orders aimed at clarifying the facts and issues or for ensuring compliance with case management orders.

23. In *Hempdan v Ishmael* [201 7] ICR 486 the EAT observed that the purpose of the deposit order was to identify at an early stage claims with little prospect of success and to discourage pursuit of the claims by requiring a sum to be paid and creating a risk of costs (expenses) if the claim failed. An order to pay a

deposit had to be one capable of being complied with. A party without the means or the ability to pay should not be ordered to pay a sum that he or she are unlikely to be able to raise.

24. The requirement for claims of direct discrimination are primarily found in section 13 of the EqA and for harassment in section 26.

The respondents' position on the strike out application

25. In summary, the respondents argued that even when taking the claimant's pleadings at their highest, assuming that all allegations can be proven, the religious discrimination complaints still would not succeed.

26. The respondents argued that the claimant's pleadings do not make sufficient if any reference to the claimant's religious beliefs. There was no link between the alleged treatment and the protected characteristic of religious belief. Even the sparse references that exist do not specify why the claimant believes that he was subject to unfavourable treatment for being a Protestant Christian. The respondents' position was that even if the statements were taken at face value, the claim of religious discrimination had no reasonable prospect of success.

27. The respondents also appreciated caution that a Tribunal must exercise when deciding to strike out a discrimination case. However, that does not negate the ability to make an assessment. In the absence of any real mention of religion in the pleadings, the case falls within the realm of "plain and obvious" when determining reasonable prospects of success.

28. The respondents argued that the claimant had ample opportunity to better specify his claims at previous preliminary hearings and through case management orders. Even after doing so, the claimant had not provided any compelling allegations of religious discrimination. From the absence of any allegations relating to religious discrimination, the respondents argued that it was unnecessary to hear evidence before striking out the case.

29. Ms Finlayson said that the discrimination claims against the third respondent can only be relevant to the extent that the third respondent has subjected the

claimant to a detriment because of religion. The claimant's case appeared to be that he is relying on the fact that he was not offered subsequent work as being detrimental treatment. However, the claimant has not in his claim form or further particulars identified any link between the alleged detrimental treatment and the alleged protected characteristic of religion. It was not the third respondent's decision what work was offered to the claimant. Ms Finlayson argued that the lack of material from which a specific causal link could be ascertained was found to be sufficient basis for striking out in *Croke.* It was argued that this was also a case where there was not in any ordinary sense a case which was fact sensitive and it could be struck out at a preliminary stage.

The claimant's position on the strike out application

30. In summary the claimant reminded me that he was a lay person and has been unrepresented throughout these proceedings. He presented his claim form intimating that he had complaints of unfair dismissal and discrimination. The claim form did not have any sections upon which to detail the sections of the EqA or the ERA that applied. He assumed that this would be "fleshed out and clarified" at preliminary hearings.

31. The claimant referred in the claim form to the types of claim that he was making and that he ticked he was discriminated on the grounds of religion or belief. The claimant referred to the background and details of his claim at section 8.2 of the claim form.

32. The claimant referred to photographs of religious discrimination taken at the Grangemouth site which he had provided to the Tribunal on previous occasions and which were made available to me at this preliminary hearing. The claimant said that in his previous employment working for financial institutions, there had been no issues with regard to religion as the culture was one of dignity at work. This was in contrast to the graffiti at the first respondent's premises attacking Rangers or religious graffiti attacking the Queen or the Pope. The claimant also referred to the alleged behaviour of the third respondent particularly an incident in a car park following which, two

days later, the claimant asserts that the third respondent paid him off unexpectedly. The claimant referred me to an email sent on 31 May 2019 which he said supported his position that his payoff was unexpected and was not for the reasons asserted by the respondents.

33. The claimant argued that it was clear from the outset that he was bringing a claim of religious discrimination. On 27 November 2019 he had received a letter from the Tribunal advising that the case management preliminary hearing was being extended to two hours and unexpectedly required by 10 December 2019 to set out in writing, amongst other things the date, nature and perpetrator of each and every allegation of discrimination and harassment. The claimant endeavoured to comply with this order. He had set out answers in an accompanying email sent on 18 December 2019 (the December Email) which included information under the heading "CMO Agenda - Answers" and attached to the email a table headed "unfair dismissal and religious discrimination - chronological order". The columns in the table had headings: "Event No/Date"; "Event"; "Categorisation"; and "Comparator".

34. The claimant explained that at the January 2020 PH he anticipated that there would be a further discussion about his claims. His recollection was that there was little discussion in relation to the religious belief discrimination. The focus was primarily on the claimant's entitlement to bring an unfair dismissal claim. There was no discussion about the comparator that he had mentioned in the table. The claimant referred to the "classification" set out in the email.

35. The claimant argued , in effect and summary, that it should not be granted. I had discretion to allow the case to proceed to a full hearing in order to test the evidence. The claimant referred to various authorities demonstrating that strike out particularly of a discrimination claim was a draconian step without a full evidential hearing. He also argued that I should be slow to strike out a claim brought by a party litigant on the basis that it has no reasonable prospects of success.

Deliberation on the strike out application

36. As I understand from the respondents' position, they acknowledge that to strike out a claim on the grounds that it had no reasonable prospects of success requires me to form a view on the merits of the case and only where I am satisfied that the claim has no reasonable prospect of succeeding can I strike out the claim.

37. I also understand that the respondents accept that that I require to act cautiously when striking out a discrimination claim and that I should take the claimant's case at it highest. Their position appeared to be that in this case, there was no dispute on the factual issues and that taking the claimant's case at its highest, there was no reasonable prospect of success.

38. The respondents referred me to the claimant's "pleadings". Their position was that this comprised the ET1 claim form and the table attached to the December Email although not the December Email itself. Ms Finlayson's alternative argument was that even if I included the December Email the respondents' application should be granted.

39. I did not consider that it was appropriate for me to confine my consideration of the respondents' application to the claimant s pleadings. My reasoning was that the claimant is a party litigant. While he talks confidently about the law and procedure on investigation it is apparent that his understanding is not as robust as he implies. For example in the claim form he makes an application for interim relief. He anticipated that the case management preliminary hearing in January 2020 would be the point at which his claims will be discussed and "fleshed out".

40. While the claim form was presented in September 2019 and there had been a number of preliminary hearings I was not convinced that the claimant had had ample opportunity to set out the discrimination claim on the ground of religion. At the January 2020 PH there was general discussion about his claims but the focus was on the unfair dismissal complaint which was subsequently the subject of the an amendment application. The January 2020 PH note records that "none of the parties thought that any further details

were necessary at this stage". The parties' focus was then on the amendment application, followed by the strike out of the unfair dismissal and the issue of philosophical belief. There was no reference to any discussion or request for additional information in relation to discrimination claim on the ground of religion. While I appreciate that it was open to the claimant to so do his focus was directed to other issues that were being determined.

41. I therefore considered the claimant's explanation of his case of discrimination on grounds of religion at this preliminary hearing. I read the pleadings including additional information and the key documents which the claimant says sets out his case.

42. From the documentation, the claim form included a claim based on the protected characteristic of religion or belief. The December 2019 Email and the attached table detailed that this claim was being pursued and that he asserted that he was treated less favourably than others whom he specifically names in the table as comparators. The claimant also specified which type of discrimination he was claiming in respect of each allegation. I was satisfied that the claimant has set out his religion: Protestant Christian.

43. It remained not easy to ascertain all aspects of the claimant's claim as to direct discrimination on the protected characteristic of his religion and his position on the comparators was not as clear as it might be in that those comparators set out in the table were not on the face of it similar or not in materially different circumstances to him. Although this table was available at the January 2020 PH, other than confirmation this comprised the claimant's case under the EqA, there appears to have been little drilling down about comparators or any other information in the table and this was overtaken by the events.

44. The test for strike out is a very high one as I set out above. I consider that the claimant has provided sufficient detail, just, to meet it. He sets out a number of matters that may if proved in evidence, suffice to provide primarily facts from which inference of discrimination could be drawn, absent an explanation for them. The respondents dispute them for the present purposes that that is not the point.

45. In my view there is a core disputed fact as to the reason why the claimant's appointment was terminated and why he was treated in the way that he was. The core facts may or may not be held established and that is dependent on the evidence heard, which includes not just written documentation which the respondents argue is insufficient but also oral evidence by the witnesses who are called. The claimant does have the burden of proof but that in turn depends on whether or not he can establish a prima facie case. He has some arguments on that from the material submitted. I do not consider that it is appropriate to spell these out at this stage as that will depend not only on submissions to me at this stage but also on the evidence heard and the full submissions then made about that evidence. It is possible that the evidence is not the same as the submission before me and that the reliance is not placed on all the factors that I consider are sufficient to require me to refuse the application for strike out. If his prima facie is made out, the burden may then shift under section 136 to the respondents. It may or may not then be discharged. I do not consider that the test for strikeout in this regard is met and it is refused.

46. The claim for harassment is made under section 26 of the EqA. It appeared to me that the claimant had pled sufficient to require me not to strike this out It is unusual for a manager to address a worker in the manner that he allegedly did in relation to taking breaks, particularly when others were not challenged in the same way. The claimant may have felt that the situation met with the statutory definition and that his perception is one of the factors to be taken into account but which is part of the core disputed facts. It is unclear whether or not the actions were because of the claimant's protected characteristic or simply there was another explanation for it. The issue of causation is, however, part of the core disputed facts and therefore I considered that it would not be appropriate to strike out this claim and the application in this regard is refused.

47. The matter will therefore proceed to the final hearing for determination of these claims.

48. For the avoidance of doubt, this judgment should not be taken as an indication that the claims do have reasonable prospects of success. Whether they succeed or fail will depend on the evidence led.

The respondents' position on the application for deposit order

49. The respondents set out the argument they made. In brief, they argued that if I did not agree that the claimant's claims had no reasonable prospects of success for the same reasons, the respondents argued that these claim had little prospects of success.

50. The respondents were invited to comment on the amount that the claimant should be ordered to pay should a deposit order be made. Neither the first or second respondent had any comment. The third respondent suggested £175, being the amount that the claimant conceded that he would pay in order to enter a golfing tournament.

The claimant's position on the application for deposit order

51. The claimant argued that he had provided sufficient detail that his religious discrimination claim had prospect of success. He set out his financial position in a writes submission on which he also gave evidence.

52. The claimant is separated from his wife. He has a son and daughter aged 24 and 21 respectively. Over the past three years the claimant has had to sell various properties. On each occasion, he has moved to smaller residences. While there has been a small amount of equity on each transaction, he has used this to live on. He has not been in receipt of benefits. He has significant debt on various credit cards. He now lives in rented accommodation.

53. The claimant is now a professional golfer and is reliant on his placings in golfing tournaments for income. Some of these competitions require an entry fee which are variable but could be around £175. As yet he has had no income from being a pro golfer.

54. The claimant has a car which has negative equity. His bank balance is currently enough to cover his monthly living expenses. The claimant said that he had no means to pay a deposit.

Deliberations on the application for a deposit order

55. The test of little reasonable prospects of success is less rigorous than no reasonable prospect of success. I have a broad discretion and greater leeway when considering a deposit order application. However I must still have a proper basis for doubting the likelihood of the claimant being able to establish the essential facts to the claim. There is little guidance in the authorities as to what is meant by little reasonable prospect of success.

56. I am not restricted to considering purely legal questions. I am entitled to have regard to the likelihood of the claimant being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order was one which no reasonable employment judge could make or that it had failed to take into account relative matters or take into account irrelevant matters.

57. This was a finely balanced decision. There are arguments in favour of granting the deposit order sought. The religious discrimination claims being made appeared to me to be at the lower end of the range of prospects of success as it is not easy to see why the protected characteristic relied on is the reason for the acts which are alleged to be detriments or the conduct complained of. The claimant does not appear to have a clear understanding about the important concepts that are part of his claims. In relation to his direct discrimination claim, he has referred to comparators who may or may not be appropriate comparators. He may therefore have some difficulty establishing that any less favourable treatment was on the ground of his protected characteristic. While the claimant undoubtably believed that he was subject to unwanted conduct by the third respondent and that the atmosphere at the first respondent's premises created an intimidating and hostile environment, it is not entirely clear that he will be successful in demonstrating that this related to the protected characteristic of his religion.

58. I concluded that despite those arguments, it was not in accordance with the overriding objective to make the deposit order contended for. I did so for the following reasons.

59. The respondents said that there were no disputed core facts. That was not my understanding. For example the parties dispute the reasons for and the involvement of the third respondent in "paying off" the claimant. I did not consider it possible to assess purely from submissions whether the claimant or the respondents' evidence will be preferred and therefore if there is little prospect of success. While the claims have not been pled as clearly as they might have been, as mentioned above that does not follow that there are little reasonable prospects of success.

60. As the case law has demonstrated, there is a public interest in having such discrimination claims heard and determined on the evidence. I consider that in a marginal case which this one is given the claims as pled and the circumstances relating to them this is a factor that militates against making such an order.

61. The claimant is a party litigant. It is unsurprising that he has not pled the case as well as others might have done or that his understanding of some of the concepts which the claims proceed is imperfect if not at times lacking. These matters may however be clarified after hearing all the evidence. When giving his evidence, he may be able to explain matters more .effectively in cross examination or from the Tribunal, which may cast a different light on the assessment of prospects possible at this stage.

62. It is not possible to know at this stage whether the burden of proof will be engaged and if so at what point. It is not beyond possible that there may be. If they are, the burden passes to the respondents. At this stage, it is difficult to assess whether or not the claimant will able to establish an apparent case which will engage 4hose provisions.

63. The claimant's financial circumstances are limited. He has no income and his savings have diminished over the last three years and are likely to be exhausted quickly unless he is successful at a golf tournament. He has

significant debt. It is hard to see on the figures how he will repay his debt and meet his current outgoings.

64. While I considered that the third respondent's proposal of a deposit of £175 was nominal in all the circumstances I did not consider to do so was in accordance with the overriding objective.

65. I therefore refused the application. For the avoidance of doubt I do not say that the claims have reasonable prospects of success but the terms of rule 39 read with rule 2 lead me to conclude that no deposit is appropriate. Any application for expenses at any subsequent hearing will be a matter for the Tribunal and this decision should no be taken as forming a view should such an application be made.

Employment Judge: **P O'Donnell**
Date of Judgment: **04 September 2023**
Entered in register: **05 September 2023**
and copied to parties