



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000028/2023

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Preliminary Hearing held in Edinburgh on 22 August 2023

Employment Judge Sangster

10 **Ms N Mitchell**

Claimant

15 **Diligenta Limited**

**Respondent
Represented by
Ms S Ellison
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's complaints of indirect discrimination are struck out, in accordance with Rule 37(1)(a) of the Employment
25 Tribunals Rules of Procedure, on the basis that they have no reasonable prospect of success.

REASONS

Introduction

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1. The claimant's claim was lodged with the Tribunal on 18 January 2023. Early conciliation had taken place from 17-18 January 2023.
2. The claimant submitted a completed agenda document on 17 February 2023, which contained further particulars of her complaints. The respondent lodged
35 their ET3 on 20 February 2023.
3. Case management preliminary hearings took place in relation to the claim on 19 April 2023 (the **First Preliminary Hearing**) and 8 June 2023 (the **Second Preliminary Hearing**).

4. At the First Preliminary Hearing, the claimant was ordered to provide further particulars of her complaints. The statutory definition of indirect discrimination was discussed and the claimant was directed that, in respect of each allegation of indirect discrimination, she should provide details including:

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- a. What was the relevant provision, criterion or practice (“PCP”)?
- b. What group was the PCP applied to?
- c. What protected characteristic is relied upon?
- d. What was the particular disadvantage resulting from the application of the PCP to people with the same protected characteristic as the claimant when compared to others not sharing that protected characteristic?

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5. The claimant provided further particulars of her complaints on 5 May 2023 (the **Further Particulars**).

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6. At the Second Preliminary Hearing the respondent indicated that they still required further information in relation to the claimant’s indirect discrimination complaints. The claimant indicated that she would provide this voluntarily. She did so on 9 June 2023, simply reiterating the information she had previously provided in relation to the indirect discrimination complaints. The claimant provided further details on 19 July 2023, in response to further questions from the respondent seeking clarification of the PCPs and group disadvantage in relation to the indirect discrimination complaints.

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7. On 4 August 2023, the respondent applied to strike out the claimant’s claims of indirect discrimination, on the basis that, despite repeated attempts, the claimant had failed to specify an appropriate provision, criterion or practice and the complaints accordingly have no reasonable prospects of success. Parties were informed that this application would be considered at the preliminary hearing listed to take place on 22 August 2023.

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8. On 23 June 2023, the respondent provided a list of issues (the **List of Issues**) to the Tribunal and the claimant, covering the issues to be determined by the Tribunal in relation to each of the complaints which they understood the

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claimant was seeking to advance (some of which were subject to an amendment application). At the commencement of the preliminary hearing on 23 August 2023, the claimant confirmed that addressed each of the complaints which she sought to advance.

5 9. At the hearing, which was also listed to address other matters, the respondent made a brief submission in support of their application for strike out, summarising the procedural background to the case and addressing the reasons for the application, as set out in their correspondence dated 4 August 2023.

10 10. The claimant was invited to make a submission in response, but declined to do so. In response to questions from the Judge, she confirmed that each asserted act of indirect discrimination stated in the List of Issues was an example of a way in which she had been singled out for treatment. They were not examples of how she had been treated the same way as others were, or
15 would be, treated.

Relevant Law

11. The Tribunal has power to strike-out the whole or part of claim under Rule 37 of the Employment Tribunals Rules of Procedure.

20 12. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18) given the draconian nature of the power.

13. Similarly, in *Anyanwu and anor v South Bank Student Union and anor* 2001 ICR 391, HL, the House of Lords was clear that great caution must be
25 exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

14. In considering whether to strike-out, the Tribunal must take the claimant's case at its highest and assume he will make out the facts he offers to prove
30 unless those facts are conclusively disproved or fundamentally inconsistent

with contemporaneous documents (*Mechkarov v Citibank NA* 2016 ICR 1121, EAT).

Decision

- 5 15. By the claimant's own admission, the asserted PCPs are each examples of a way in which she had been singled out for treatment. They are not examples of how she had been treated the same way as others were, or would be treated. That concession appears to the Tribunal to be correctly made. Each asserted PCP in the List of Issues references one off acts taken by the
- 10 respondent which solely relate to the claimant. No group disadvantage is asserted in any of the further particulars submitted by the claimant. The Tribunal accordingly concluded that, taking the claimant's claim at its highest, she will not be able to establish that acts of indirect discrimination within the strict legal definition, as she asserts. The complaints of indirect discrimination
- 15 therefore have no reasonable prospects of success.
16. The claimant has now had numerous opportunities to particularise her indirect discrimination complaints, as follows:
- a. upon lodging her ET1 Claim Form on 18 January 2023;
 - b. in her agenda document lodged on 17 February 2023, where specific
 - 20 questions are asked covering the requirements of complaints of this nature;
 - c. in her Further Particulars lodged on 5 May 2023, following discussion in relation to the requirements of such complaints at the First Preliminary Hearing;
 - 25 d. in her correspondence dated 9 June 2023 in response to the questions asked by the respondent regarding the PCPs relied upon; and
 - e. in her correspondence of 19 July 2023, in response to further questions from the respondent seeking clarification of the PCPs and group disadvantage in relation to the indirect discrimination
 - 30 complaints.

17. The Tribunal, in considering whether strike-out is proportionate, has taken account that the acts asserted as indirect discrimination are also, in the main, asserted as acts of direct discrimination and/or harassment. If the indirect discrimination complaints are struck-out, the claimant can still pursue those complaints.

18. The Tribunal is mindful of the case law that Tribunals should be slow to strike out complaints where the claimant is representing themselves, particularly in claims where discrimination is asserted. This is a case however where the Tribunal has concluded that, even if the claimant proves all that she offers to, the circumstances alleged will not amount to acts of indirect discrimination within the strict legal definition. The complaints of indirect discrimination therefore have no reasonable prospects of success. In light of this, and the procedural history, it is proportionate that they be struck out at this stage.

Employment Judge: Sangster
Date of Judgment: 24 August 2023
Entered in register: 28 August 2023
and copied to parties

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