EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000183/2023 Preliminary Hearing by Cloud Video Platform at Edinburgh on 4 October 2023

Employment Judge: M A Macleod

Jörg Zimmermann	**Claimant** **In Person**
Heriot Watt University	**Respondent** **Represented by** **Ms C Howie** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim is struck out on the grounds that it has no reasonable prospect of success, under Rule 37(1) of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 19 April 2023 in which he set out, at considerable length, a large number of claims which he wished to place before the Tribunal.

2. The respondent presented an ET3 response in which they resisted all claims made by the claimant.

3. Following an application by the respondent to strike out the claimant's claim, a Preliminary Hearing was listed to take place on 4 October 2023 by Cloud Video Platform (CVP).

4. The claimant appeared on his own behalf at the Preliminary Hearing, and the respondent was represented by Ms Howie, solicitor. A joint bundle of productions was produced to the Tribunal and referred to in the course of the Hearing.

5. It is appropriate to set out a summary of the background to this Hearing; the respondent's application; the submissions of each party; the relevant law; and the Tribunal's decision.

6. It should be noted that the respondent had raised the issue of time bar in advance of the Hearing, in writing, but that the Notice of Hearing issued to the parties had not identified that that was to be considered at this Hearing. When I asked the claimant about this, he expressed concern that he had not anticipated that time bar would be dealt with at this Hearing, and that he had not prepared for such an eventuality. As a result, I directed the parties that I would only hear the submissions on the application for strike out under Rule 37, and that the issue of time bar would not be addressed in this Hearing, on the basis that I did not consider it to be in the interests of justice to do so. I concluded that it would be unfair to the claimant to deal with the issue at this Hearing without adequate notice to him, as an unrepresented party.

7. The Hearing was conducted by CVP, and each participant in the Hearing was able to hear and see the others, and to be heard and seen by the others. Accordingly, no difficulties arose during the Hearing, and I was satisfied that a fair hearing took place.

Background

8. The claimant's claim form was submitted with a paper apart (15-23), which set out what appeared to be a long list of alleged contraventions of legal provisions, broadly categorised as race discrimination, detriment for having

made protected disclosures and blacklisting. As Employment Judge Jones noted in her Note following Preliminary Hearing on 21 June 2023 (105ff), the claim form also made reference to a number of claims in respect of which it was not clear that the Tribunal had jurisdiction to consider.

9. She also noted that the claimant had been ordered to produce a document setting out his claims in a clear and succinct manner, but had provided in response a further detailed document, which was "not of assistance in allowing the Tribunal to understand the claims he sought to make".

10. As a result, Employment Judge Jones sought to understand from the claimant the complaints which he wished to make, and to discern the facts upon which he was seeking to rely in this regard.

11. She summarised the claimant's response thus, in paragraph 3 of her Note:

"The claimant explained that he had applied for a post of Associate Professor with the respondent in July 2021. It appeared that the recruitment process was run by an external body. The claimant was interviewed by a Mr Brian who was employed at the University of Warwick. The claimant had previously been employed at that University and was in dispute with them. He indicated that he had alleged discriminatory conduct on their part on the basis of his nationality (he is German) and that this amounted to a protected act in terms of the Equality Act 2010. He explained that he was not successful in his application and was informed of this in September 2021. He then made a subject access request of the respondent in October 2021. Initially he was informed that there was no record of his application, but he was then informed that there was a record, but it had been deleted."

12. She went on to note (paragraph 4) that:

"His claim appeared to be that he had done a protected act, being making allegations of discrimination to the University of Warwick in relation to his employment there. He alleges that the failure to appoint him to the role with the respondent was an act of victimisation by an individual who was employed at the University of Warwick, because he had done the

protected act and that the respondent had aided that individual in that act of victimisation. The claimant suggested that the respondent's actions in concealing that they did not know he had made the application for the role with them amounted to aiding the University of Warwick in the act of victimisation. He said that the individuals responsible were a Mr Roger who had been the Head of Strategy and Enterprise with the respondent but was now Head of Faculty of Social Science and another individual who had been Head of Faculty of Social Science but who was now in another role."

13. Employment Judge Jones explained that it was still not immediately clear to her what claims he was seeking to make, and that she would give him one final opportunity to set out the basis of his claim. As a result, she issued Orders requiring him to do so. At that point, the respondent's solicitor observed that the claimant's claim was not stateable, and that an application for strike out may well follow.

14. In response, the claimant presented a lengthy document (110-135), headed "Further Facts", in which he sought to set out many breaches of various statutory provisions, in a tabular form.

Application for Strike-Out

15. On 2 August 2023, the respondent sought to apply for strike-out of the claimant's claim under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, on the basis that the claimant's claims have no reasonable prospect of success (145).

16. The application asserted that the claimant had had 4 separate opportunities to set out the basis of his claim against the respondent, namely (1) his ET1 on 19 April 2023; (2) when the Tribunal ordered him to set out his claims in a clear and succinct manner following receipt of his ET1; (3) at the Case Management Preliminary Hearing before Employment Judge Jones on 21 June 2023; and (4) when he was ordered further to that PH to specify his claim, and to which order he responded by submitting a 35 page document.

17. The respondent submitted that despite the significant volume of information provided by the claimant, he had still not offered to prove a claim in relation

to which the Tribunal has jurisdiction. They invited the Tribunal to strike out the claims on the basis that they have no reasonable prospect of success.

18. They referred to Employment Judge Jones having identified that his claims fell into two categories, namely (a) a claim under section 112 of the Equality Act 2010 for aiding a third party in its victimisation of the claimant in breach of section 27 of the 2010 Act; and a breach of the Employment Relations Act 1999 (Blacklists) Regulations 2010.

19. The respondent went on to address each of these two categories.

20. Firstly, the claim under section 112 of the 2010 Act. They maintained that they had carefully reviewed the significant volume of documentation produced by the claimant, and summarised the claim made, as they understood it, to be:

    (1) That the respondent did not follow its own recruitment processes and procedures;

    (2) That the respondent followed the shortlisting recommendations made by its executive search firm and did not shortlist the claimant;

    (3) That the respondent told the claimant that it did not have a record of the claimant's application;

    (4) That the respondent did not seek the claimant's consent before sharing information about this application with its executive search firm;

    (5) That the respondent did not respond to the claimant's complaint adequately; and

    (6) That the respondent did not respond adequately to the claimant's data subject access request.

21. The respondent argued that the claimant has not offered any explanation as to why those facts amount to aiding victimisation under section 112, and that in fact they do not.

22. The claimant, they said, believes himself to have been victimised by a third party, but has not explain how. As a result, it is not possible to find that the respondent has aided victimisation.

23. Secondly, the complaint under the Blacklisting Regulations. The respondent observed that the claimant has said that he was listed on a separate list by his employer, a list which the UCU representative stated he had not been aware existed; and that in his extensive further documents he has not provided any further details of this claim.

24. The respondent's position is that the claimant has not offered to prove any facts which, if proved, would make the respondent liable under the Blacklisting Regulations. He has not pled facts which would show that any list referred to was a prohibited list, nor that the respondent was aware of the list, or took it into account in any such list in any decision they took in relation to the claimant.

25. The respondent referred to other claims to which the claimant had referred in his correspondence, but regarded those as unspecified and therefore considered that they were outwith the Tribunal's jurisdiction.

26. The respondent therefore requested that the claimant's claims be struck out on the basis that they have no reasonable prospect of success. In the alternative, they asked that a deposit order be granted against the claimant as a condition of his being permitted to continue with the claims, on the basis that they have little reasonable prospect of success.

27. They concluded by making reference to a possible application for expenses, in certain circumstances, but no such application is currently before the Tribunal and therefore I do not address that matter here.

Submissions

28. For the respondent, Ms Howie presented an oral submission, which was based on a skeleton submission emailed to the Tribunal shortly after the Hearing, and available to the Tribunal in advance of writing this Judgment.

29. The Tribunal took into full account the terms of the skeleton submission and Ms Howie's oral submission, though it is useful to note that the application set out the fundamental points being made and the submissions expanded upon those points. It is not necessary to repeat its detailed terms.

30. Reference will be made to the submission of the respondent as appropriate in the decision section below.

31. The claimant made a submission on his own behalf, and it is appropriate, in the absence of any written submissions, to summarise briefly the terms of his submissions to this Hearing. Again, those submissions are taken fully into account in the decision below.

32. He acknowledged that he had had difficulty specifying the claims he is seeking to make. He maintained that he had raised all his claims from the beginning (156), and that they were "very precise"; he then provided additional comments to the questions put by the Tribunal.

33. He referred to his allegation (156) that the respondent, in their capacity as principal of SearchHigher, applied measures that aided the detrimental treatment (victimisation) of the claimant by the University of Warwick. When he applied for a position with the respondent, SearchHigher conducted a process, and as soon as they became aware that he had done a protected act, that influenced SearchHigher to treat his application detrimentally. The claimant then pointed to a number of documents produced in the bundle for this Hearing as evidence that there was a failure on the part of the respondent to keep records in relation to him, and that the respondent failed to apply the criteria for the prospective role to him, breaching their own procedures as they did so.

34. The claimant embarked on a series of criticisms of the respondent's recruitment process, in particular as it affected his own application, and accused the respondent of a number of breaches of its own policies and of failures in the handling of his data subject access request. He accused them of having engaged in concealment efforts, and gave examples from the evidence which he had presented. One such example was that at one point,

an individual whom I shall identify only as BR for these purposes was shown on 3 September 2021 as having a position as Head of Strategy and Enterprise subject group at Edinburgh Business School (192), but that he was retroactively allocated to a different group, according to the terms of a LinkedIn profile (219).

35. With regard to the blacklisting allegations, the claimant pointed out that he submitted a grievance to his former employer (185) on 13 December 2019, and then attached a document which appeared to be a "snapshot" of a legal review of his claim against his previous employer, though who wrote that review is unclear, other than that the document is headed "University and College Union". He said that this was additional information about the significance of his trade union role.

36. He pointed to BIS Guidance on the Blacklisting of Trade Unionists (235ff) which he had produced, and observed that it is said therein that it is not important that the list refers to a trade union. He maintained that the non-forwarding of any application, and the failure to download the claimant's application, had had an impact where he was discriminated against because he had done a protected act in relation to his trade union activity.

37. He listed the acts which he regarded as detriments on this basis, namely:

- The respondent violated their recruitment process;
- They failed to scrutinise his application in terms of its own recruitment process;
- They violated [his rights] by not treating him equally;
- They violated their own records process by not keeping an application for 6 months;
- They violated subject access request processes; and
- They violated their own grievance process.

38. With regard to the alternative application for a deposit order, the claimant said that he is not currently in paid employment, nor in receipt of state benefits. He said that he believed he could make a payment of a deposit if required to do so, but that that would be likely to affect his ability to attend any Hearing which would then take place.

39. The parties then both made relatively brief supplementary submissions which were, again, taken into account.

The Relevant Law

40. Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

41. Rule 37(2) provides:

"A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

42. In this case, plainly, the claimant was given the opportunity to attend a hearing and did so.

43. In **Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA**, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, striking out must be a proportionate response.

44. The court went on to say (paragraph 21): *"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist."*

45. Sedley LJ, in **Bennett v Southwark LBC [2002] ICR 881**, considered the question of proportionality in the context of that appeal: *"But proportionality must be borne carefully in mind in deciding these applications, for it is not every instance of misuse of the judicial process, albeit it properly falls within the descriptions scandalous, frivolous or vexatious, which will be sufficient to justify the premature termination of a claim or of the defence to it. Here, as elsewhere, firm case management may well afford a better solution…."*

46. The case of **Faron Fariba v Pfizer Limited & Others UKEAT/0605/10/CEA** was a case in which the EAT found that an Employment Judge was entitled to strike out claims by a claimant who had demonstrated by her disregard for Tribunal orders and the allegations made in correspondence against the respondent, their solicitors and the Tribunal that she was incapable of bringing her complaints to a fair and orderly trial.

47. In reviewing the claimant's conduct, Mr Justice Underhill noted: *"Dr Fariba said at this hearing that the Tribunal was being distracted from dealing with her employment claim. I entirely agree with that statement, but in my judgment it is Dr Fariba who has not been focussing upon the specific legal claims that she wishes to have the Tribunal determine, but has consistently sought to divert attention from them by raising peripheral issues and making extensive and excessive allegations."*

48. At a later stage in the judgment, Mr Justice Underhill said: *"This is not… a case of the (not uncommon) kind where a litigant in person fails to meet deadlines and/or behaves unreasonably or offensively but is nevertheless doing his or misguided best to comply with the directions set by the tribunal in order to get to trial. Instead, the scatter of allegations of misconduct, the applications for a stay, the pursuit of other proceedings, the threats of resort to criminal or regulatory sanctions, clearly indicated that the Appellant's focus was entirely elsewhere and that if the case remained live she would, if I may use my own language, continue to thrash around indefinitely. That is why, and the sense in which, the Judge concluded that a fair trial was impossible."*

Discussion and Decision

49. The issue before me is whether the respondent's application for strike-out of the claimant's claims should be granted, on the basis that the claims have no reasonable prospect of success.

50. I have already made reference to the background of this case, and the attempts made by Employment Judge Jones to have the claimant clarify in a succinct manner what claims he was seeking to make. On review of the original claim and the first set of further and better particulars in this case, it is quite clear that the claimant had failed to provide a clear and understandable basis for a claim to the Employment Tribunal.

51. The ET1 is simply a lengthy list of short statements alleging breaches, detriments and violations, under particular statutory or other categories, without any averments of fact being made. The attachment to the ET1 does

not provide elucidation, but merely extends and expands the list of general allegations. As the claimant should now be well aware, a claim to an Employment Tribunal must not only be understandable to both the Tribunal and to the respondent, but also must be clear as to the factual basis of the claim. The claimant has stated that the respondent has been guilty of a number of infractions of the law, but in the ET1 and attached paper apart it is impossible to discern what exactly he was saying the respondent had done to attract such allegations. In other words, he did not actually aver facts but simply presented a long list of what he regarded as being legal breaches or violations, presumably of his rights.

52. The claimant sought to provide Further Particulars in response to an Order of the Employment Tribunal. Regrettably, this was composed of another lengthy list of alleged breaches and violations, in extremely general terms, although there did appear to be some attempts to raise factual assertions within that document, referring to the recruitment process for the position of Associate Professor in Strategy in the respondent's University, and to actions relating to retention of records and recruitment policies.

53. The claimant was informed by the Tribunal that while this additional attempt to pursue his claim would be discussed at a forthcoming case management Preliminary Hearing, the basis of his claim appeared to remain unclear. The Employment Judge advised him that he required to attend the Preliminary Hearing prepared to explain in straightforward and concise terms the basis of his claim, and in particular who was alleged to have done what, when and on what basis he alleged that any such actions amounted to unlawful conduct in respect of the Tribunal had jurisdiction.

54. This culminated in the Tribunal's Order, following that Preliminary Hearing on 21 June 2023, issued by Employment Judge Jones (105). She summarised the two claims which she believed the claimant to be making as having been (1) a claim that the respondent aided his former employer, the University of Warwick, in victimising him on the grounds of his race contrary to section 27 of the Equality Act 2010, under section 112 of the 2010 Act; and (2) a claim that the respondent breached the Employment

Relations Act 1999 (Blacklists) Regulations 2010. She required him to provide further clarification of those claims to the Tribunal and to the respondent.

55. On 12 July 2023 the claimant issued a further email attaching the details of the "requested Further Facts" (109), and the attachment (110ff) which ran to some 34 pages was set out in the form of a "Scott Schedule". It was this response which generated the respondent's application for strike out of the claimant's claim.

56. Arising from this Schedule is a third claim, namely that SearchHigher, an agent of the respondent (who were allegedly principal in that relationship), subjected the claimant to a detriment by sabotaging his application to the respondent under section 109 of the 2010 Act.

57. It should be noted that the application is made on the grounds that the claimant's claims have no reasonable prospect of success, and not on the basis that the claimant has conducted the proceedings in an unreasonable manner, or failed to comply with an Order of the Tribunal.

58. The claimant clearly believes that he has set out his claim in compliance with the Tribunal's Order, and that he has done so in a manner which is concise and clear. I have no doubt that he is genuine in that belief.

59. The respondent is equally clearly of the view that the claims as articulated to date are so unclear as to prevent them from having fair notice of the complaints made against them.

60. I deal with the three heads of claim separately.

61. Firstly, the claim that the respondent has aided victimisation contrary to section 112 of the 2010 Act.

62. In my judgment, leaving aside the lack of clarity generally in the claimant's claims (with which I deal below), there is a major problem with the claimant's claim of aiding victimisation. The claimant alleges that the respondent assisted, or aided, the University of Warwick in carrying out an

act of victimisation against him, on the grounds of race. He does not allege with any clarity what it was that the University of Warwick did which amounted to victimisation in the first place. As the respondent argues, if no act of victimisation has taken place then the respondent cannot have aided it.

63. It may be an obvious point, but the claimant does not appear to have understood it. He has sought, in the Scott Schedule (125) to make reference to victimisation under section 27 by the respondent, but that is not the basis of his claim, which is that the victimisation was carried out by his previous employer, aided by the respondent. However, without a clear set of allegations as to what the victimisation carried out by the University of Warwick against him, it is impossible for this Tribunal to discern a stateable claim against the respondent for having aided it. The claimant has focused at enormous length on what he perceives to have been unlawful or malign actions by the respondent against him, but has failed, in my judgment, to link any factual assertions to the original act of victimisation against him.

64. There is no doubt that the claimant has asserted in clear terms that the respondent "applied measures that aided…the detrimental treatment (victimisation)" of the claimant by his previous employer.

65. The acts which he relies on are, essentially, that the respondent did not follow its own recruitment processes and procedures, that they were not able to provide a record of having downloaded or accessed his application, that the Data Protection Officer employed by the respondent misrepresented his handling of the application and that the respondent attempted concealment to help and hide the victimisation.

66. As the respondent pointed out, the prohibition in section 122 is against a person "knowingly" doing anything which contravenes that part of the Act.

67. The claimant does not, then, allege what the victimisation by the University of Warwick, nor does he allege that the respondent knew of that victimisation, and acted knowingly to aid the victimisation.

68. As a result, the claimant's claim that the respondent aided the victimisation (howsoever defined) by the University of Warwick cannot succeed. The claimant has simply failed to present averments which would lead to the conclusion that the respondent had knowingly acted to aid an act of victimisation.

69. Notwithstanding the lengthy documents placed before the Tribunal by the claimant, it is my judgment that the claim that the respondent aided the University of Warwick or SearchHigher in subjecting him to victimisation must be struck out on the basis that it has no reasonable prospect of success.

70. Secondly, the claimant complains that he was subjected to blacklisting under the Employment Relations Act 1999 (Blacklisting) Regulations 2010.

71. The claimant asserts that the respondent's agent, SearchHigher, used the list of candidates selected for the shortlisting process as a prohibited list as it related to the claimant, and the respondent, essentially, did not consider the claimant's application because of that list.

72. The respondent submits that the claimant has not offered to prove that he was on a list of persons who were or had been members of trade unions or persons who were taking part or had taken part in the activities of trade unions. The list provided to the respondent by SearchHigher was a shortlist of candidates said by them to be suitable for interview and thereafter appointment. The claimant does not suggest in his pleadings that that list was related in any way to his membership or activities as a member of a trade union.

73. Simply pointing to the fact that his name at some point appeared on a list of some description does not satisfy the requirement of the 2010 Regulations. The claimant has failed to demonstrate how these provisions are in any way related to what he says happened in his case.

74. It appears to me that the claimant is very frustrated that he was not shortlisted, and indeed appointed, by the respondent, but has taken up this

particular complaint as a means of trying to show that he was "blacklisted", in the generally understood use of that word. However, he has not demonstrated how the circumstances he relies upon could be said to have anything to do with the definition within the Regulations of a blacklist or a prohibited list.

75. As a result, I agree with the respondent's submission that there is no basis upon which it can be said that this claim has any reasonable prospect of success.

76. Thirdly, I acknowledge that the claimant has also involved SearchHigher in this claim, in the sense that he makes allegations against them that they failed in the recruitment process (164). However, he does not seek to establish on what basis SearchHigher could be held liable for an act of victimisation under section 27 of the 2010 Act, when they were not in an employment or other relevant relationship with him. He suggests, without any foundation in his allegations, that the respondent was the principal in an agency relationship with SearchHigher, but does not clarify how SearchHigher could be held liable for any act of victimisation against him. Again, though, such an act of victimisation is not clearly laid out by the claimant.

77. He does assert that SearchHigher sabotaged his application to the respondent. What he does not do is specify with any clarity why he seeks to hold the respondent liable for any such sabotage. He asserts very broadly that they acted as agent for the respondent, but he does not provide a factual background to that assertion, nor how the respondent was involved in any decision made by SearchHigher to sabotage the application, nor how it was done with the respondent's authority. As to what he means by "sabotage", the Tribunal is entirely unclear.

78. Accordingly, this claim has no reasonable prospect of success, since he has not in any way linked the respondent to the allegation made only against SearchHigher, nor has he explained why he has not raised those

allegations in legal proceedings against SearchHigher. This claim is therefore struck out.

79. It is therefore my conclusion that the claimant's claims have no reasonable prospect of success, and must be dismissed. I appreciate that the claimant will be disappointed with this outcome, particularly given that he has plainly spent a huge amount of time and effort on presenting complaints against the respondent. However, his attempts to place his claims before the Tribunal have not resulted in a clear and answerable set of complaints under the legal provisions he seeks to rely upon, but have, as time has gone on, become impossible to understand. The Tribunal cannot consider claims which have not been specified sufficiently to allow the respondent to understand how to defend them, and in these proceedings the claimant's efforts have sadly failed to clarify his claims, or answer the concerns raised with him by the Tribunal and the respondent.

80. Accordingly, the claimant's claim is struck out under Rule 37(1) on the grounds that it lacks any reasonable prospect of success.

Employment Judge: **MacLeod**
Date of Judgment: **02 November 2023**
Entered in register: **02 November 2023**
and copied to parties

I confirm that this is my Judgment in the case of Zimmermann v Heriot Watt University and that I have signed the Judgment by electronic means.