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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000037/2024**

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**Preliminary hearing  
held in Edinburgh  
on 28 June 2024**

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**Employment Judge A Jones**

**Dr O Dada**

**Claimant  
In person**

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**Right There**

**Represented by  
Mr Gale, solicitor**

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### **JUDGMENT**

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- i. The Tribunal does not have jurisdiction to determine the claimant's claim of wrongful dismissal.
- ii. The claimant's claim of direct discrimination because of the protected characteristic of race has no reasonable prospect of success and is struck out.

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### **Background**

1. The claimant lodged a claim of wrongful dismissal and racial discrimination on 9 January 2024. The respondent resisted the claimant's claims. In their response form they called on the claimant to specify his claim of

discrimination as it was said to be lacking in any specification. It was also said that no claim of wrongful dismissal had been made out.

2. A preliminary hearing for the purposes of case management took place on 13 March. Both parties had submitted agenda documents in advance of that hearing. In the respondent's agenda document a further call was made on the claimant to specify his claim of race discrimination. The respondent also set out their position that the Tribunal had no jurisdiction to determine the claimant's claim of wrongful dismissal given his status as a casual worker.
3. At the hearing on 13 March, the claimant was ordered to specify his claim of race discrimination by answering questions which were to be set out by the respondent. A hearing was set down to determine whether the Tribunal had jurisdiction to consider the claimant's claim of wrongful dismissal. The claimant was to provide answers to the questions asked by 24 April. Having received these answers, the respondent wrote to the Tribunal on 8 May indicating that the claimant had not provided adequate specification of his claim, and in particular had failed to meaningfully answer the question of why he considered the treatment he complained of as having been because of his race.
4. The claimant was then directed by the Tribunal to answer that question within 7 days in a letter of 14 May.
5. The claimant purported to provide further specification to address this issue in a letter of 20 May. In that letter the claimant made reference to hypothetical comparators, although in so doing simply set out the issues he said amounted to discriminatory treatment. The claimant also made reference to actual comparators and in so doing made reference to the individuals who had been involved in investigating the incident for which the claimant was said to have been dismissed.
6. The respondent provided comments on that correspondence from the claimant and concluded by requesting a preliminary hearing to determine whether the claimant's claim of direct discrimination had any prospects of success. The claimant opposed that request in an email of 27 May.
7. On 28 May a letter was sent to parties indicating that the issue of whether the claimant's claim of direct discrimination had no reasonable prospects of

success or had little prospect of success such that he should be required to lodge a deposit in order to continue with his claim would be determined at the hearing which had already been listed for 28 June. The respondent's agent was directed to provide to the claimant an outline of submissions it intended to make at this hearing at least 7 days in advance.

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8. The claimant then wrote to the Tribunal on 29 May suggesting that no application had been made by the respondent for strike out of his claim and that the decision to determine this issue at the hearing on 28 June should be rescinded. The respondent responded making reference to their previous email.

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9. The Tribunal wrote to parties on 30 May clarifying that the hearing on 28 June would determine the issue of strike out and/or deposit order in relation to the claimant's claim of race discrimination. The letter stated "The Tribunal is of the view that there is some force in the suggestion of the respondent that as currently pled the claimant's claim of race discrimination may not have any or may have little prospects of success. The claimant may wish to consider making an application to add further particulars to his claim to address the issues highlighted by the respondent in its email of 24 May. If no such application is made, the issue of whether or not the claimant's claim of race discrimination has little or no prospects of success will be determined on the basis of the claimant's claims currently set out." The claimant's request for a reconsideration was therefore refused.

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10. The claimant made a request that the hearing on 28 June be conducted before a full Tribunal, and that request was refused for reasons set out in a letter of 20 June to the parties.

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11. The claimant then wrote to the Tribunal on 26 June indicating that the respondent had not provided an outline of the submissions to be made at the hearing in accordance with the directions of the Tribunal. The claimant requested that on this basis, the issue of strike out/deposit order should not be considered at the hearing on 28 June. The respondent responded later that day making reference to and attaching emails of 24 May and 29 May which it was said set out the position to be adopted by the respondent at the hearing.

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12. The claimant reiterated his application that the hearing on 28 June only consider the issue of jurisdiction in respect of the claimant's claim of wrongful dismissal by email dated 27 June. That application had not been addressed by the morning of the hearing as the email had been received at 4.10pm on 27 June.
13. Therefore at the commencement of the hearing on 28 June, I asked parties to address me on this issue. I asked the claimant on more than one occasion whether he was seeking a postponement of this hearing. However the claimant reiterated that his only application was that the decision to determine the question of strike out/deposit order should be rescinded and the claimant's claim of discrimination should proceed to a final hearing. The respondent's position was that they had complied with the direction of the Tribunal in that they had set out their position in previous emails and indicated that they would not raise any new issues other than those already set out in those emails.
14. Having given the parties an opportunity to address me on this issue, I determined that the hearing would proceed as previously advised. I indicated to the respondent that it would have been more helpful if they had confirmed at an earlier stage that their previous emails should be taken to be their submissions or indeed had provided the claimant with a separate draft submission in advance of the hearing. It was regrettable that they had not done so. However, I was also mindful that the claimant was quite clear that he was not asking for a postponement of this hearing but asking that the question of strike out/deposit order not be considered at all. On the basis that the respondent did not intend to raise any new issue not already intimated to the claimant, I was of the view that it was in keeping with the overriding objective to continue to determine the issues which had been outlined to parties in advance of this hearing.
15. A joint bundle of documents had been provided and I heard evidence from the claimant in relation to the question of his employment status. Parties then made submissions on the issue of whether the Tribunal had jurisdiction to consider the claimant's claim of wrongful dismissal. I then heard from

parties on the question of whether or not the claimant's claim of direct race discrimination had prospects of success.

### Issues to determine

5 16. The issues to determine at this hearing were:

- i. Did the Tribunal have jurisdiction to determine the claimant's claim of breach of contract,
- 10 ii. Did the claimant's claim of race discrimination have no reasonable prospects of success in terms of Rule 37(1)(a) in Schedule 1 of Employment Tribunal Rules of Procedure 2013, or
- iii. Did any of the allegations made by the claimant have little reasonable prospects of success such that a deposit order should be made within the terms of Rule 39.

### 15 Relevant law

17. In terms of the issue of jurisdiction, the relevant provisions are contained in section 3 Employment Tribunals Act 1996 together with Employment  
Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624. The effect  
20 of these provisions is that in order for a Tribunal to have jurisdiction to consider a breach of contract claim, the claim must arise or be outstanding on the termination of the employee's employment and must seek damages for a breach of a contract of employment or any other contract connected with employment.

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18. In terms of strike out and deposit orders, the relevant provisions of the rules of procedure are Rules 37 and 39 which provide:

#### Rule 37

30 (1) 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 Rule 39 provides that  
(a) that it is scandalous or vexatious or has no reasonable prospect of success;

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(2) 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.

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(39)

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

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(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

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(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

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(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

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(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

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(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

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## Submissions

40 19. The claimant's submissions in terms of the issue of breach of contract were that he was employed under a zero hours contract which was a contract of employment. He made reference to sections 27A and 27B Employment Rights Act and section 230 of that Act. He also made reference to **Cornwall County Council v Prater 2006 ECWA Civ 102**.

20. The respondent's position was that the claimant was engaged under a Casual Worker's Agreement which did not amount to a contract of employment for the purposes of section 230 ERA and that his working arrangements were consistent with the status of worker and not employee.

5 It was said that a contract connected with employment required the existence of an employment contract in the first place and that what was envisaged was for instance a settlement agreement.

21. In terms of the issue of prospects of success, I sought to explore with the claimant why he alleged he had been treated in the way he had because of his race. He kept reiterating that a white person would not have been treated in the same way. I sought to explore with him whether there were any facts he was offering to provide from which such an inference could be drawn. The claimant's position was that the respondent had not followed its policies and procedures in relation to him.

15 22. The respondent's position was that the claimant had not discharged the burden of proof on him to demonstrate facts from which an inference of discrimination could be drawn. Their position was that the respondent operated a truncated policy in relation to casual workers and that the disciplinary procedures to which the claimant referred did not apply to him or any other casual worker. I explored with the claimant whether he was seeking to challenge that position. He indicated he was but could not offer any evidential basis for so doing other than that reference to the disciplinary procedure had been made in the documents he was provided with on commencement of his engagement. The respondent highlighted that it was not enough to discharge the burden of proof on a claimant in such a case to point to unreasonable conduct or procedural shortcomings. It was said that the claimant had been given a number of opportunities to explain why he was alleging that he had been subjected to racial discrimination but had consistently failed to do so.

## Discussion and decision

### Jurisdiction

5 23. The claimant's position was that he was employed on a zero hours contract  
and this amounted to a contract of employment. The claimant's evidence in  
relation to the hours he worked changed on a number of occasions and he  
had to be reminded that he was under oath when giving evidence. Initially  
his evidence was that he had never refused to work any shifts offered to  
10 him. When an exchange of text messages was put to him which  
demonstrated this not to be true, his evidence was that this was the only  
one occasion on which he had turned down a shift. However after a number  
of other text exchanges demonstrated this not to be true either, the  
claimant's evidence became that he did not often turn down shifts.

15 24. The claimant was not employed on a zero hours contract. The agreement  
he had signed was for that of a Casual Worker. That agreement made clear  
that the respondent was not obliged to offer him any work and he was not  
obliged to accept any work. In addition to this being the documented  
arrangements between the parties, it was clear that this was the reality of  
20 the relationship. The claimant did, on a number of occasions, turn down  
shifts offered to him. On other occasions, he gave the respondent his  
availability but was informed that there were no shifts available during those  
times. The claimant had no pattern of working arrangements and worked for  
another organisation at the same time with the knowledge and agreement of  
25 the respondent. I was satisfied that there was no mutuality of obligation  
between the parties. There was no overarching contract of employment.

25. Although the point was not put to me, I considered whether it could be said  
that each occasion on which the claimant had worked was a contract of  
employment. I concluded that this was not an accurate reflection of the  
30 arrangements between the parties, but that the claimant was in effect an  
independent contractor engaged under a contract for services on each  
occasion on which he worked for the respondent. I recognised that the  
claimant was not self-employed but concluded that there was no contract of



employment in existence between him and the respondent which would afford the Tribunal the jurisdiction to determine a breach of contract claim advanced by him.

5           **Prospects of success of discrimination claim**

26. The claimant had been given a number of opportunities to set out the detail of his claim. The deficiencies in his claim had been highlighted to him by the respondent and the Tribunal had suggested to him that he might wish to consider amending his claim to address these.

27. His claim was effectively that the respondent had not followed its own procedure in dismissing him and that by failing to do and by dismissing him, the respondent had discriminated against the claimant because of his race. While the claimant submitted lengthy further particulars of his claim, he did not set out any basis on which he proposed to demonstrate that the reason for his treatment could have been because of his race. It is appreciated that the burden of proof in a discrimination claim falls initially on a claimant, albeit that this is not necessarily a straightforward exercise and that it is difficult for claimants to put forward direct evidence of discriminatory treatment. It is also appreciated that great care should be taken in striking out a claim of discrimination particularly where a claimant is unrepresented and especially where there are any facts in dispute.

28. In the present case, there are facts in dispute in that the claimant says he did not do what he was accused of doing, or at least that the respondent had not demonstrated that he had done what they were accusing him of. All of those facts would be relevant if the claimant were advancing a claim of unfair dismissal. However, the claimant confirmed that he does not seek to bring such a claim, no doubt mindful of his employment status.

29. The claimant has highlighted what is on the face of it unfavourable treatment in that he has alleged that he was dismissed and that appropriate procedures were not followed in advance of him being dismissed.

30. However what the claimant has not offered to prove is any fact from which it could be inferred that this treatment was because of his race. He makes

reference to comparators, but these comparators are clearly not in the same material circumstances, they are witnesses or investigators in relation to the incident which is the subject of the dispute between the parties. They cannot be valid comparators for the purposes of establishing discrimination.

5 While the claimant appears to set out the basis on which he will construct a hypothetical comparator, the information provided relates to the unfavourable treatment he is complaining of rather than any evidence he is offering to put forward as to why the unfavourable treatment could be because of his race.

10 31. The claimant is clearly an intelligent and able individual, albeit it is appreciated that he is not legally qualified and is representing himself. I sought to explore with him during the hearing why he said he was treated in this way because of his race, but his response amounted to no more than a white person in my circumstances would not have been treated in the same way. When I tried to determine what evidence he was going to rely on in support of that proposition the claimant could not point to any evidence  
15 either in the particulars already lodged by him or the documents before the Tribunal. Rather he appeared to suggest that the respondent had conspired against him to dismiss him, again without evidence to support this  
20 allegation.

32. In all these circumstances, I was of the view that the claimant's claim of direct discrimination had no reasonable prospects of success and should be struck out.

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<b>Employment Judge:</b>	<b>A Jones</b>
<b>Date of Judgment:</b>	<b>2 July 2024</b>
<b>Entered in register:</b>	<b>3 July 2024</b>
<b>and copied to parties</b>	<b>03/07/2024</b>

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