



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000437/2023

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Held in Glasgow on 17 June 2024

**Employment Judge L Murphy
Tribunal Member A Grant
Tribunal Member N Elliot**

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Mr R Rohatgi

**Claimant
In Person**

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Capita Customer Management Limited

**Respondent
Represented by:
Mr O Mills -
Barrister (E&W)**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's application to strike out the respondent's response in its entirety is refused.

WRITTEN REASONS FOR REFUSAL

25 Introduction

1. The claimant was employed by the respondent as a Customer Service Advisor from 9 May 2022 until he was dismissed on 9 August 2023. He complained of direct race discrimination under section 13 of the Equality Act 2010 ("EA"). The respondent denied the claim in its entirety.
- 30 2. The respondent was represented by an English qualified barrister called Mr Jackson at preliminary hearing on 6 November 2023. The claimant made an application to strike out the respondent's response to the claim on the basis that he said the respondent's representative did not have rights of audience before the employment tribunal in Scotland. In correspondence which
35 ensued, EJ Hoey ordered that his application, if insisted upon, would be dealt

with at the start of the final hearing which was ultimately listed for 5 days in June 2024.

3. The final hearing took place at the Glasgow Tribunal on 17 – 20 June. On the first day of the hearing, the Tribunal heard the claimant’s strike out application.
- 5 The respondent was once again represented at the hearing by an English qualified barrister, this time named Mr Mills. The Tribunal unanimously refused the strike out application. Oral reasons were given. At the hearing, the claimant requested written reasons which are now provided.

The claimant’s application – parties submissions

- 10 4. C spoke to a written strike out application. In the interests of brevity, I do not repeat its terms in full. In summary, C relied upon section 6 of the Employment Tribunals Act 1996 (the ETA). He said that if R made use of a solicitor or counsel, their representative would require to hold a Scottish practising certificate from the Law Society of Scotland (in the case of a solicitor) or be a
- 15 Scottish advocate belonging to the Faculty of Advocates in Scotland (in the case of counsel). He referred to the terms of the Solicitors (Scotland) Act 1980. He said that Mr Jackson was neither a Scottish solicitor nor an advocate at the Scottish bar. He said that R had acted ‘scandalously’ by using an English lawyer in the Glasgow Employment Tribunal. He clarified it was Mr
- 20 Jackson’s representation on 6 November and only that act which he relied upon. He said it was unreasonable. He said that the jurisdiction of the Glasgow ET was limited to cases where either C or R carry on a business or are situated in the city. He said that by appearing in Glasgow, Mr Jackson was depriving a local Scottish lawyer of fees.
- 25 5. C said that he had looked at many tribunal cases online and that only in one or two of several hundred had a party been represented by someone other than a Scotland based lawyer. He said the Tribunal was making a legal mistake by assuming that any lawyer from any jurisdiction or country can represent a party at an Employment Tribunal. C also produced an excerpt
- 30 from an article which appeared in the Herald newspaper which concerned the

question of whether an English barrister had a right of audience in the Court of Session.

6. Mr Mills opposed C's application to strike out the response and gave oral submissions. It was accepted by R that both Mr Mills and Mr Jackson were called to the bar in England and Wales and that neither of them were Scottish qualified solicitors or advocates. Mr Mills said that C might have an argument if the forum was the Court of Session. He said that in the Employment Tribunal, however, the question was governed by section 6 of the ETA. He said that under section 6(1) (a) a person may be represented by counsel or a solicitor. He said that this was not limited in the Act to any jurisdiction. He noted the word 'counsel' had been used as opposed to 'advocate' or 'barrister'. If Parliament had intended to limit the rights of audience to advocates when sitting in Scotland and barristers when in England, then one would have expected them to have specified this in the legislation. He noted the legislators chose not to. He said that he and Mr Jackson both fell within section 6(a) of the ETA but that, even if they did not, they would have rights of audience under section 6(1)(c).

Relevant Law

7. The ETA was an Act to consolidate enactments relating to Employment Tribunals and the Employment Appeal Tribunal. It applies in Scotland and in England and Wales. Section 6 of the ETA is in the following terms:

"6 Conduct of hearings

(1) *A person may appear before an employment tribunal in person or be represented by:*

- (a) *counsel or a solicitor,*
- (b) *a representative of a trade union or employer's association, or*
- (c) *any other person whom he desires to represent him*

...

8. Schedule A1 to the ETA (Procedure Rules) provides at section 9:

“Procedure rules may make provision conferring additional rights of audience before the Tribunal.”

5 9. Such Procedure Rules have been enacted. Their latest form is the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as amended. These Rules make no further reference to the issue of rights of audience.

Discussion and Decision

10 10. The issue is governed by section 6 of the ETA. Caselaw concerning rights of audience in the Court of Session is not relevant in the present context. The Solicitors (Scotland) Act 1980 is of peripheral relevance given neither Mr Mills or Mr Jackson were English qualified solicitors. In any event, there is nothing in that Act which cuts across the terms of section 6 of the ETA.

15 11. The question is one of statutory interpretation. The provision to be interpreted is a brief one and is contained wholly in s.6 of the ETA. Nevertheless it is helpful to acknowledge briefly some context. Employment law is reserved to Westminster though most private law including contract, delict and damages is devolved. The territorial reach of the ETA extends to Scotland as well as England and Wales. The jurisdiction of Tribunals both north and south of the is (in the vast majority of cases) conferred by the same enactments and the substantive laws the Tribunals in Scotland and England apply are, for the most part, identical (albeit as mentioned, there are a few exceptions, for example, in relation to contractual or delictual questions). The Employment Appeal Tribunal (EAT), whose composition and jurisdiction is also governed
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25 by the ETA is a GB court. Employment Tribunals sitting in Scotland are bound by decisions of the EAT whether given in Scotland or England and vice versa.

30 12. The claimant’s argument was essentially that the words “qualified in Scotland in the case of Employment Tribunals sitting in Scotland or qualified in England and Wales in the case of Employment Tribunals sitting in England and Wales” should implicitly be read into subsection 6(1)(a) to qualify the breadth of the

category in that subsection. He said that if a representative was counsel or a solicitor qualified in any jurisdiction other than the country in which the Employment Tribunal was sitting then they would also be excluded from relying on categories 1(b) or 1(c) of section 6 because of the use of the word 'or' at the end of 1(b). In essence he said this rendered the three categories in section 6(1) mutually exclusive.

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13. We saw no basis to read additional words into the terms of section 6(1)(a) of the ETA to qualify its breadth. As Mr Mills pointed out, the draftsman could have used terminology which was specific and individual to the nations to which the ETA would apply by choosing the word barrister or advocate but specifically chose not to. The draftsman could have specified that qualification in the nation where the Employment Tribunal was sitting was required to fall within the category in subsection (a) but chose not to. The draftsman could have specified that, in the case of solicitors, a Scottish practising certificate was required in order to have rights of audience in an Employment Tribunal in Scotland. They chose not to.

14. This seemed to us to be a deliberate drafting decision entirely in keeping with the context of the ETA mentioned above. It also seemed to us to be in keeping with the relative informality of the Employment Tribunal forum where, as the ETA specifies, it is unnecessary to be legally or otherwise qualified to have rights of audience (s.6(1)(c)). It would be an odd situation if the only categories of person excluded from rights of audience were legally qualified solicitors and counsel from jurisdictions other than Scotland while other individuals with no legal qualifications or employment law experience were entitled to appear. That is not the effect on a plain reading of section 6.

15. The claimant's assertions about the territorial jurisdiction of the Glasgow Employment Tribunal being limited to claimants and respondents situated in or carrying on business in the city limits was a misstatement of the law and did not further his argument. We identified nothing in the provisions of the Solicitors (Scotland) Act 1980 C cited which would cast doubt upon the correctness of our interpretation of section 6 of the ETA or which would conflict with it. Nothing we were taken to appeared to us to create any conflict

with the ETA's provisions or require qualifications to be read into section 6 of the sort the claimant contended for.

16. In any event, even if C had persuaded us that the qualification he contended for should be read into section 6(1)(a), it is clear that Mr Jackson would have
5 enjoyed a right of audience under section 6(1)(c). If an English barrister in Scotland is excluded from (a) because of the limitation the claimant says is implicit in that subsection (namely that he must be qualified in the country in which he appears) then it follows that he would fall into the residual category
10 (c) of 'any other person ...'. The argument that (a) should be read with an implied nation-specific qualification for the purpose of determining if Mr Jackson is 'counsel or a solicitor', but that the same subsection (a) should be read without this qualification for the purposes of identifying whether he is 'any other person' in (c) lacks logic.

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Employment Judge: L Murphy
Date of Judgment: 06 August 2024
Entered in register: 07 August 2024
and copied to parties

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