EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J McMillan	AND	Beacon Education MAT Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 6 September 2024

EMPLOYMENT JUDGE J Bax (by video)

Representation

For the Claimant: Mr J McMillan, in person
For the Respondent: Mr D Piddington, counsel

JUDGMENT ON APPLICATION TO AMEND

1. The claimant's application to amend the originating application is granted.

Judgment on the Respondent's application to strike out the claims or for a deposit order in the alternative

2. The Respondent's application to strike out the claim of breach of contract or for a deposit order in the alternative is dismissed.

3. The Respondent's application to strike out the discrimination claim is dismissed.

4. For the reasons explained below, the Employment Judge considers that the Claimant's claim of direct race discrimination by association has little reasonable prospect of success.

   The Claimant is ORDERED to pay a deposit of £500 not later than **21** days from the date this Order is sent as a condition of being permitted to continue

to advance those allegations or arguments. The Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

1. In this case the claimant sought leave to amend the claim to add a single claim of direct race discrimination by association. The Respondent also made an application to strike out the claims on the basis that they had no reasonable prospects of success or for a deposit order in the alternative on the basis that they had little reasonable prospects of success.

Procedural background

2. The general background and procedural history of the claim as it stands before the determination of this application is as follows.

3. The Claimant notified ACAS of the dispute on 15 December 2023 and the certificate was issued on 26 January 2024. The claim was presented on 3 February 2024.

4. He stated in the claim form it was a claim of "breach of contract (possibly discrimination – no case law)." The claim form said he lived in Vietnam and had a wife and 2 children there. On 11 October 2023 he spoke to Ms Mackie and said he had a previous conviction. His testimonials were accepted as 2 references and police checks were only needed from Vietnam. The police check from Vietnam was sent on 17 October. After a successful demo lesson and interview he was offered a post on 7 November, which he accepted. He then received an offer letter dated 9 November. He asked if his health check and references were still acceptable, which was confirmed. He made preparations to leave Vietnam and bought a plane tickets. On 20 November he completed the DBS documentation. On 24 November Mr Lakin said that due to his previous conviction, his passport and driving licence were no longer proof of his identity and right to work in the UK and he needed proof of his NI number and bank statement by 30 November or the offer would be withdrawn. The offer of employment was withdrawn on 30 November 2023. The Claimant said the reasons for the withdrawal were incorrect. There was no suggestion as to how he had been discriminated against.

5. The Respondent filed a response. It said that there was not a contract between them. It had sent an offer of employment which was conditional on the Claimant having successful DBS clearance and two satisfactory references and that a formal contract would be issued following satisfactory completion of all checks. By 30 November, the DBS check had not been cleared. It says the Claimant had not provided the required documents or

police checks of good conduct for each country he had spent more than three months and provided information that he had previously been found guilty to the violent offence of common assault. His referees had not responded to requests for references. The offer was withdrawn

6. On 6 April 2024, the Claimant applied to amend his claim: He set out the following information:
    a. He had seen a case in America where a white woman was appointed to a job and later her husband, who was black, attended a works team event and two days later she was fired for gross misconduct which was false. The Claimant had a Vietnamese wife and two children with her.
    b. In relation to whether it was a new allegation he had said possible discrimination but he had not assigned a class of discrimination to it.
    c. The ET3 had not been returned at that stage. He made the application as soon as possible.
    d. He said the protected characteristic was race. There was a prima facie case of discrimination because his wife and children are Vietnamese nationals. He is protected by reason of the prohibition of discrimination by association. Mr Lakin lied in the withdrawal letter and lied when requesting two documents to prove his identity and right to work in the UK, by an impossible deadline. Mr Lakin lied when he said his passport and driving licence were insufficient to prove identity and right to work in the UK.

7. The Respondent was sent the application on 2 June 2024 and asked to provide comments. It provided comments on 10 June 2024, which included:
    a. The Claimant had said on his application form he lived in Vietnam with his Vietnamese wife and their children. It therefore knew the identifying aspects of the race of his wife and children. In full knowledge of that he had been made the offer. By 30 November, his referees had not provided their references and the DBS check had not been cleared and the offer was withdrawn.
    b. The application did not set out new facts as to how he believed he was discriminated against or how his family's race had any bearing.
    c. It did not state what discriminatory acts the Respondent did.
    d. Initially in correspondence he had said he had been discriminated against on the basis he had a conviction for common assault. That is something very different to race discrimination.
    e. The offer was withdrawn because he had not provided documents to complete a DBS check, failed to provide valid proof of address, had not provided police checks of good conduct for each country in which he had spent more than 3 months and did not disclose at an early stage he had pleaded guilty to common assault.

8. At the start of the hearing the Claimant confirmed that he was seeking to add a single allegation of direct race discrimination by association in relation to the withdrawal of the offer of employment. He relied upon a hypothetical comparator. The association alleged was that his wife was a Vietnamese national.

Documents provided

9. The application for the job said that the Claimant lived and worked in Vietnam and had Vietnamese wife and children. It also said he worked in Kazakhstan between August 2013 and June 2015 and Abu Dhabi between August and December 2011 and Dubai between January and June 2012.

10. The offer letter said it was subject to the following: successful DBS clearance, successful medical health clearance and 2 satisfactory references.

11. The disqualification declaration said he had been convicted of a violent or sexual offence against an adult. He explained he was attacked by 2 men with a broom handle and wrestled with them. He punched the first one and then had the broom handle. His plea was not guilty but the magistrate said he should have pleaded self-defence rather than 'not guilty.'

12. On 9 November 2023 he was asked to provide documents and it was said "as you have lived/worked abroad, we will need to have a certificate of good conduct and police checks from each country please."

13. There were e-mails on 9 and 10 November about the difficulties in obtaining the correct ID needed to be able to verify the DBS check. The Respondent relied on the Claimant saying, "am I employed there??" [p78]

14. There were screenshots of reference requests saying pending candidate authorisation and pending referee details from candidate with boxes ticked as do not action. [p84]

15. There was an undated note from Verifile saying the DBS check was not complete due to being unable to verify identity. There were also messages from which it appeared that the Claimant's file had been deleted at Verifile [p82-3].

16. On 20 November 2023 e-mails were sent about difficulty in getting proof of his NI number. He said he could not get a P45 or P60 because he had not been working in the UK [p81]. He had sent a screen shot of his Teacher's Pension document.

17. The letter of 30 November said that he had not met the conditions. They had been unable to complete the DBS check due to insufficient documents and they required 2 references which they had not received [p85].

18. In the Claimant's letter to the Respondent dated 18 December 2023, he said Mr Lakin had said, "Due to my previous criminal conviction additional steps were required of me. This is discrimination which can be easily seen by substituting, 'my previous conviction,' for 'you being black', 'you being disabled' etc." He also said he had been employed by 3 teaching agencies each having an advanced DBS check. He had successful medical clearance. The Respondent had told him his testimonials would be satisfactory for his references

The Application to amend the claim

Claimant's oral submissions

19. The Claimant submitted that the discrimination claim had not been included in the claim form because he had not known he could bring such a claim. He had subsequently seen a report of an American case where there had been discrimination by association and thought the situation applied to him and made the application to amend. He accepted it would be a hypothetical comparator for the purpose of the claim.

20. In relation to the merits of the claim he said that the information he was told on 30 November was incorrect. He had not provided 2 references but had provided testimonials, which Ms Mackie had accepted. The DBS process could not be started until he provided originals. He relied on the Sherlock Holmes quote in relation to once all matters are disproved, whatever is left, no matter how improbable it is what happened. He said those matters in conjunction with him saying he was having to relocate from Vietnam and he had Vietnamese wife and children was sufficient to discharge the initial burden of proof.

The Respondent's oral submissions

21. The Respondent's submissions focused on the merits of the claim sought to be brought. It submitted that the Respondent knew of the nationality of the Claimants' wife in the job application and still offered him the role, which was inconsistent with subsequent discrimination. When he made the claim he did not consider it was race discrimination by association. The Claimant would have great difficulty in establishing that a comparator would have been treated differently. There was significant correspondence about the Claimant trying to comply with the requirements. There was no basis to conclude that the Claimant would discharge the initial burden of proof and there were no reasonable prospects of success.

The Law on amendments

22. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.

23. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.

24. In Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07 Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the Cocking test, and, specifically, no review of all the circumstances including the relative balance of injustice.

25. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

26. 1 - The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

27. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time; and

28. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

29. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim).

30. In Vaughan v Modality Partnership UKEAT 0147/20, the EAT confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The factors identified in Selkent are not a tick box exercise, they are the kind of factors likely to be relevant in striking the balance. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition and they should not allege prejudice if it does not really exist. This requires a focus on reality, rather than assumptions. It will often be appropriate to consent to an amendment that causes no real prejudice. A balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

31. Amendment Where Fresh Claim Could Be Presented: Claims that accrue after the original presentation of the claim form can be added rather than presenting a fresh claim, see Prakash v Wolverhampton City Council UKEAT/0140/06. This amounts to an amendment to the original claim subject to the normal principles of amendment. It is a more efficient and cheaper way of allowing the newly accrued claim.

32. 1 - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called “relabelling”); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

33. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).

34. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".

35. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

36. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).

37. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the

application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

38. 4 - The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

Burden of proof in discrimination cases

39. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

40. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

Conclusion on the amendment application

41. The Claimant sought to add a new claim of direct race discrimination in relation to the withdrawal of his offer of employment. In his claim form there

was no suggestion that he was less favourably treated on the basis of race or the race of his wife and family. This was a wholly new allegation and cause of action.

42. The Claimant applied to amend his claim on 6 April 2024. The time limit for making a claim of discrimination, taking into account pausing for early conciliation, would have expired on 11 April 2024. It was therefore made within the time limits. There has then been considerable time for that application to be listed. In effect the Claimant sought to amend his claim within the time limits and no criticism can be levelled at him for the time it has taken for the application to be heard.

43. The application was made at an early stage of proceedings. The Claimant was unaware that discrimination by association existed, at the time he presented the claim.

44. The significant issue was the merits of the claim. There is an initial burden of proof on a Claimant in a discrimination claim to prove facts tending to show, in the absence of an explanation by the Respondent, that the less favourable treatment was because of the protected characteristic and that an appropriate comparator would have been treated better. An appropriate comparator in this case would be a UK national who had a wife and family who were also UK nationals and who had a similar conviction to that of the Claimant and had been working overseas for a similar amount of time.

45. The Claimant suggests that what tends to show that discrimination had occurred was that it was apparent on his application form that his wife and children were Vietnamese. He says he was required to jump through additional and unnecessary hoops. Further that it had been agreed that his testimonials were sufficient for his references and further that the DBS could not be started until he provided his original documents which he could not do until he arrived in the country.

46. The law in relation to the burden of proof was relevant. The something more, need not be a great deal.

47. The Claimant was sent the offer letter, with the Respondent being aware of the nationality of his wife and family, he was offered an interview and attended the assessment and was conditionally offered the role. The Claimant needs to adduce something more than a bare difference.

48. The Claimant was abroad with a Vietnamese wife and needed to relocate, he has said that the reasons given on 30 November were incorrect and that the Respondent had gone back on the agreement that his testimonials were sufficient. There are apparent anomalies which could be something which might be enough to shift the burden of proof. Those matters however are

not particularly strong and have no obvious link the nationality of his wife. The claimant's case is weak and he will have difficulty in discharging the burden of proof. However I was not satisfied it was so weak, to say it had no reasonable prospects of success.

49. It is important that discrimination cases are heard and determined after hearing evidence. This was not a claim which it was so weak that it was bound to fail.

50. Balancing all factors together the prejudice and hardship to the Claimant was greater, if the application was refused, than that to the Respondent than if it was granted.

51. The application was granted.

Respondent's application to strike out the claim or for a deposit order in the alternative.

Respondent's oral submissions on strike out and deposit

52. The Respondent repeated its submissions on the prospects of success in relation to the discrimination claim.

53. In relation to the breach of contract claim it submitted that the Claimant had been inconsistent in his claim form as to whether he had accepted the oral offer on 7 November 2023. The subsequent conditional offer letter was inconsistent with there being an oral contract. The Claimant accepted that there needed to be a check for criminal records. On 10 November, the Claimant had queried whether he was employed there. The correspondence was inconsistent with the parties already being bound.

54. In relation to whether the conditions had been complied with. The Claimant had not provided a good conduct certificate from Kazakhstan, Abu Dhabi or Dubai and therefore it could be withdrawn on that basis. They were unable to take up the references. Verifile had said it could not complete the DBS check because the claimant's identity had not been confirmed. It was submitted there were no reasonable prospects of success for either claim.

Claimant's oral submissions

55. The Claimant said that he was offered the job and he accepted it on 7 November 2023. When he received the letter on 9 November Ms Mackie told him it was a formality. Ms Mackie had never denied she made him the verbal offer on 7 November 2023. His conviction was before he went to university and he had worked in schools in the UK since then. He had been in Vietnam for more than 5 years and only needed to provide information

for 5 years, in accordance with DBS procedure and the school's policy. He had provided an CRS check, which was an international background criminal check. His verifile profile had been deleted by someone.

56. He repeated his earlier submissions in relation to the discrimination claim.

57. He said that he could pay any deposit ordered.

The law on strike out and deposit

58. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as "the Rules". Rule 37(1) provides that:

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

59. Rule 39 provides that 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. Under Rule 39(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.

Strike out

60. Under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a tribunal can strike a claim out if it appears to have no reasonable prospect of success. It is a two stage process; even if the test under the rules is met, a judge also has to be satisfied that their discretion ought to be exercised in favour of applying such a sanction. Striking out a claim is a draconian step and numerous cases have reiterated the need to reserve such a step for the most clear and exceptional of cases (for example, Mbuisa-v-Cygnet Healthcare Ltd UKEAT/0119/18).

61. The importance of not striking out discrimination cases save in only the clearest situations has been reinforced in a number of cases, particularly Anyanwu-v-South Bank Students Union [2001] UKHL 14. In Balls-v-

Downham Market School [2011] IRLR, Lady Justice Smith made it clear that "no" in rule 37 means "no". It is a high test.

62. In Ezsias-v-North Glamorgan NHS Trust [2007] EWCA Civ 330 the Court of Appeal stated that it would only be in exceptional cases that a claim might be struck out on this ground where there was a dispute between the parties on the central facts.

63. In Cox v Adecco & Others UKEAT/0339/10/AT, HHJ Taylor after a review of the authorities summarised the general propositions for a strike out application at paragraph 28 as:

(1) No-one gains by truly hopeless cases being pursued to a hearing;
(2) …
(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
(4) The Claimant's case must ordinarily be taken at its highest;
(5) It is necessary to consider, in reasonable detail, what the claims and issues are.

Deposit Orders

64. Where a tribunal considers that any specific allegation, argument or claim has little reasonable prospect of success it may make a deposit order (rule 39). If there is a serious conflict on the facts disclosed on the face of the claim and response forms, it may be difficult to judge what the prospects of success truly are (Sharma-v-New College Nottingham [2011] UKEAT/0287/11/LA). Nevertheless the tribunal can take into account the likely credibility of the facts asserted and the likelihood that they might be established at a hearing (Spring-v-First Capital East Ltd [2011] UKEAT/0567/11/LA).

65. There must be a proper basis for doubting the ability to establish the claim. Van Rensburg v Royal Borough of Kingston-Upon-Thames UKEAT/009607.

66. In Sharma v New College Nottingham [2011] UKEAT/0287/11 When deciding whether a Claimant had proved facts from which a Tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of unlawful discrimination, it was important to bear in mind that it was unusual to find direct evidence of discrimination. In deciding whether a claimant had proved such facts, the tribunal would usually consider what inferences it was proper to draw from the primary facts, and had to assume that there was no adequate explanation for those facts,

Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] EWCA Civ 142, [2005] 3 All E.R. 812, [2005] 2 WLUK 455 applied.

67. Under rule 39(2)When considering an application for a deposit order it is also necessary to make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to such information when deciding the amount of the deposit.

68. In relation to conditional offers, the contract does not normally take effect until the condition has been fulfilled. The employer must make it clear that the offer is subject to a condition (Stubbes v Trower, Still and Keeling [1987] IRLR 321). The test for deciding whether a reference met an employer's requirements is a subjective one.

Conclusions on the strike out and deposit applications.

Breach of contract

69. The Claimant says that he was offered a verbal contract without conditions, which he accepted. There is a significant dispute of fact between the parties on this issue. It would not be possible to determine that issue without hearing oral evidence. There may be documents which could be inconsistent, however there also might have been a change of position by Ms Mackie after 7 November 2023. It is a dispute which goes to the heart of the claim.

70. The offer letter was conditional. The Respondent would have needed to be reasonably satisfied that the conditions had been met in order for the contract to come into effect. There is a significant dispute of fact as to whether the Claimant had met the conditions. He says that the Respondent had accepted his testimonials as referees and therefore he had met that requirement. He also says that the Respondent changed what he needed to provide.

71. In relation to the successful DBS clearance, no time was specified in the offer letter for its completion and the offer was retracted a month before the appointment was due to start. The Claimant says that it could not be started until he could provide his original documents when he arrived in the country.

72. In relation to good conduct checks, the Claimant says DBS required it for 5 years and he had complied. Matters are also hampered by Verifile no longer having his file.

73. To determine whether the Respondent had properly concluded that the conditions had not been met, it will be necessary to hear evidence and determine the issue.

74. Given the significant factual disputes in relation to the formation of the contract and whether the conditions had been met, it was not possible to say that the claim has no reasonable prospects of success or there is little reasonable prospects of success. The claims are not strong, however the Claimant's case must be taken at its highest and I was not satisfied that the thresholds had been met.

Discrimination claim

75. The Claimant's case must be taken at its highest. There is an initial burden of proof on a Claimant in a discrimination claim to prove facts tending to show, in the absence of an explanation, that the less favourable treatment was because of the protected characteristic and that an appropriate comparator would have been treated better.

76. I repeat my conclusions in relation to the prospects of success for the amendment application.

77. I took into account that no reasonable prospects of success is a high hurdle and the Claimant's case must be taken at its highest. The Claimant says that there was a change of stance by the Respondent and although it is difficult to see how it was related to the race of his partner, without hearing evidence I am unable to say that the claim has no reasonable prospects of success. However, at best there is little more than an apparent bare difference in treatment. The Claimant has little reasonable prospects of success in discharging the initial burden of proof. The documentation tends to suggest that it was concerns about the conviction and the documentation the Claimant was providing, or lack of it, which was the cause of the Respondents actions.

78. The Claimant has little reasonable prospects of success in his discrimination claim and taking all matters into account it is appropriate that a deposit order is made.

79. The Claimant says he can pay an order of £1,000. The appropriate amount for the deposit is £500.

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Employment Judge J Bax
Dated 6 September 2024

Judgment sent to Parties on 16 September 2024

For the Tribunal Office