



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000580/2023

Held at Aberdeen on 4 June 2024

Employment Judge N M Hosie

Mr Andrew Burr

**Claimant
In Person**

University of Aberdeen

**Respondent
Represented by,
Ms E Kinmond,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

**1, the direct discrimination complaint has “no reasonable prospect of success”
and the claim is struck out, in terms of Rule 37(1)(a) in Schedule 1 of the
Employment Tribunals (Constitution and Rules of Procedure) Regulations
2013; and**

2. the claimant’s application to strike-out the respondent's Response is refused.

E.T. Z4 (WR)

REASONS

Introduction

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1. This case called before me on 4 June 2024, by way of a Preliminary Hearing to consider a number of issues. These included an application by the claimant to amend.

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2. I refused the application. The Case Management Order which I issued on 12 June 2024 is referred to for its terms.

Strike-out applications

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3. in the Order, at paras. 71 and 72, I advised that I would deal with an application by the respondent's solicitor to strike-out the remaining direct discrimination complaint, or alternatively make a Deposit Order, by way of a separate Judgment, and, at the same time, I would also deal with the claimant's application to strike-out the respondent's response.

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The law

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4. A Tribunal is required when addressing such applications as the present to have regard to the "overriding objective", which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which states as follows:

"2. Overriding Objective

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The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

- (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense.*

5 A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each and with the Tribunal."

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Strike-out

5. Rule 37 provides as follows:

“**37. Striking Out**

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(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 -*

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- (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.....”*

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6. The EAT held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694, and in **Hassan v. Tesco Stores Ltd** UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide, as a matter of discretion, whether to strike out the claim. In **Hassan**, Lady Wise stated that the second stage is important as it is, “*a fundamental crosscheck to avoid the bringing to an end prematurely of a claim that may yet have merit*” (paragraph 19).

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7. As a general principle, discrimination cases should not be struck out, except in the very clearest circumstances. In **Anyanwu v. Southbank Students' Union** [2001] IRLR 305, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

5 *“For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest”*

8. Lord Hope of Craighead stated at paragraph 37:

10 *“.....discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on*
15 *its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.”*

9. In ***Ukegheson v. Haringey London Borough Council*** [2015] ICR 1285, it was clarified that there are no formal categories where striking out is not
20 permitted at all. It is therefore competent to strike out a claim or a response, such as the present, although in that case the Tribunal striking out of discrimination claims was reversed on appeal.

10. That it is competent to strike out a discrimination claim was made clear also
25 in ***Ahir v. British Airways Plc*** [2017] EWCA Civ1392, in which Lord Justice Elias stated that:

30 *“Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.”*

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11. If it is not possible for the claim to succeed on the legal basis put forward it may be struck out - *Romanowska v. Aspiration Care Ltd* UKEAT/0015/14.'

12. In *Mechkarov v. Citi Bank NA* [2016] ICR 1121, the EAT summarised the law as follows:-

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- “(a) only in the clearest case should a discrimination claim be struck out;
(b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
(c) the claimant’s case must ordinarily be taken at its highest;
10 (d) if the claimant’s case was “conclusively disproved by” or was “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it could be struck out;
(e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts.”

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13. A further summary of the law as to strike out was provided by the EAT in *Cox v. Adecco & Others* [2021] ILEAT/0339/19. It referred to the level of care needed before a claim was struck out., with commentary also on the difficulties faced by a litigant in person.

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Deposit

14. Rule 39 provides as follows:

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“39. Deposit Orders

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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 prospects of success, it may make an order requiring a party (“the paying party) to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.....”

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15. The EAT has considered the issue of deposit orders in *Wright v. Nipponkoa Insurance (Europe) Ltd* UKEAT/0113/14, *Hemdan v. Ishmail* [2017] ICR 486 and *Tree v. South East Coastal Services Ambulance NHS Trust* UKEAT/0043/17. In *Tree*, the EAT summarised the law at paragraphs 19-23.

Present case

Respondent's Strike-Out Application

- 5 16. This application was in respect of the claimant's remaining complaint of direct discrimination. The respondent's solicitor spoke to written submissions which are referred to for their terms. A Joint Bundle of documentary productions was also submitted ("P").
- 10 17. Judge d'Inverno had identified the complaint as one of direct discrimination, in terms of s.13 of the Equality Act 2010, at a case management Preliminary Hearing on 15 January 2024 (P. 36-37). Mr Burr set out the basis for this complaint in his claim form (P.8) and in his Further and Better Particulars (P.41).
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18. The respondent's solicitor applied for the complaint to be struck out (P.89). The claimant submitted a written objection to the strike-out application (P.97).

Discussion and Decision

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19. S.13 of the Equality Act 2010 is in the following terms:-

"13. Direct Discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others....."

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20. This section focuses on whether an individual has been treated *less favourably* because of a protected characteristic, such as disability. A claimant does not have to point to an actual person who has been treated more favourably in comparable circumstances. The comparator can be actual or hypothetical.
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21. However, it follows from the wording of s.13(1) that the comparator must not share the claimant's protected characteristic.
22. So far as the present case is concerned, this means that Mr Burr's correct comparator will be an individual who is not disabled. However, Mr Burr's claim is based on alleged unfair treatment in that as a disabled person he was not afforded an interview under the respondent's "Guaranteed Interview Scheme". His comparison is with other disabled applicants under the Scheme, not non-disabled applicants. The claimant made the basis for his claim clear in his objection to the respondent's strike-out application (P.97):
"8. **8.4 The claimant's grounds for direct discrimination are based on unfair treatment of a disabled applicant in comparison with other disabled applicants**" (P.97) (my emphasis).
23. As the respondent's solicitor correctly submitted, *"a failure to accord the claimant an interview under the "Guaranteed Interview Scheme" for disabled persons is not less favourable treatment compared with non-disabled applicants"*.
24. Accordingly, Mr Burr's claim is misconceived. It has no reasonable prospect of success.
25. I decided, having regard to the "two-stage test" in *Hassan*, that, in all the circumstances, it should be struck out, in terms of Rule 37(1)(a) in Schedule 1 of the Tribunal Rules of Procedure.
26. I might add that in arriving at this view, I had regard to the relevant case law and the high test for strike-out. I was mindful of what Lord Steyn said in ***Anyanwu & Others v. Southbank Student Union & Others*** [2001] 2 ALL ER 353, that as discrimination cases tend to be "fact sensitive" strike-outs should only be ordered: *"in the most obvious and clearest cases"*. In my view, the present case falls into that category.

Claimant's Application to Strike-Out the Respondent's Response

27. Mr Burr made an application (P.97) to strike-out the respondent's Response in terms of Rule 37(1)(b) which is in the following terms:-

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"37. Striking Out

(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 -

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*.....
(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."*

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28. I had no difficulty in refusing this application. I advised Mr Burr of this at the Hearing.

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29. The basis for the application was not clear. However, as I understood it, one of Mr Burr's complaints was that the respondent as members of the "Disability Confident Scheme" had not displayed a "badge". That allegation, even if correct, could not possibly fall within the ambit of the Rule.

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30. He also alleged that the respondent was guilty of misrepresentation as they had not afforded him an interview despite the fact that he satisfied "the criteria". That allegation went to the alleged merits of his direct discrimination complaint which, as I recorded above, was misconceived.

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31. Finally, he complained that although in the Response Form the respondent had been instructed not to attach "a covering letter" to the form (P.22) they had done so (P.24-34). However, that was not a "covering letter", but rather the respondent's Grounds of Resistance which were included in the claim form by way of a paper apart. This is a standard and accepted practice. It provided Mr Burr with fair notice of the respondent's defence to his claim, in some detail. It was not prejudicial to him in any way. It could not possibly be considered "scandalous, unreasonable or vexatious".

32. For all these reasons, therefore, Mr Burr's strike-out application is refused.

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**Employment Judge: N M Hosie
Date of Judgment: 26 June 2024
Entered in register: 27 June 2024
and copied to parties**

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