



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 8001535/2024

Hearing held in Glasgow on 26 February 2025

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Employment Judge M Whitcombe

Mr Patrick McAuley

Claimant
In person

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The Law Society of Scotland

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First Respondent
Represented by:
Mr Stephen Miller
(Solicitor)

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Scottish Legal Complaints Commission

Second Respondent
Represented by:
Mr Scott Milligan
(Solicitor)

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JUDGMENT

The judgment of the Tribunal is as follows.

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(1) The pleaded case against the First Respondent does not fall within section 41 of the Equality Act 2010.

(2) The pleaded case against the Second Respondent does not fall within section 41 of the Equality Act 2010.

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(3) Therefore, the Employment Tribunal has no jurisdiction under section 120 of the Equality Act 2010 to consider a complaint brought under Part 5 ("Work") of that Act.

5 (4) The Employment Tribunal has no jurisdiction to consider a claim for breach of the Protection from Harassment Act 1997.

(5) The claimant's application for a judgment striking out both responses is refused.

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(6) Therefore, the claim must be dismissed in its entirety.

(7) Oral reasons were given in the presence of the parties or their representatives at the end of the hearing. The claimant applied prospectively for written reasons at the end of his submissions and before the oral judgment was given. No other applications were made.

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REASONS

20 Introduction and background

1. In a claim form (ET1) received by the Tribunal on 25 September 2024 the claimant has brought complaints against both respondents under section 8 of the Protection from Harassment Act 1997 and sections 13, 19, 26 and 27 of the Equality Act 2010. He seeks compensation of £100,000 or £75,000 for the injury to his feelings.

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2. The claimant is a solicitor currently facing professional disciplinary allegations arising from his communications with Roddy Dunlop KC (Dean of the Faculty of Advocates), Mr Anthony Graham KC (Chairman of Faculty Services Limited) and Ms Westwater (Advocates Clerk) in August 2024. The first respondent is the professional body for solicitors in Scotland and the claimant

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is one of its members. The second respondent is the statutory body responsible for all legal complaints in Scotland. Both respondents have a role in the investigation and determination of professional conduct complaints in relation to solicitors in Scotland. The essence of the claimant's case is that the respondents treated him unlawfully by failing to follow the applicable policies and failing to respect his rights in relation to investigatory timescales.

3. In their responses (ET3s and attachments) the respondents both raised issues of jurisdiction. In correspondence of 4 November 2024, the second respondent also framed it as a strike out issue under what was then rule 37(1)(a) of the 2013 Rules of Procedure. EJ Hoey directed that those issues should be decided at this preliminary hearing. The claimant subsequently made an application to strike out both responses under rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024 on the basis that they have no reasonable prospect of success. EJ Hoey directed that the claimant's application to strike out should also be dealt with at this hearing.

Issues

4. Given the way in which the claimant puts his case, there are really three issues:
- a. the applicability to either or both respondents of section 41 of the Equality Act 2010 (the "Contract Workers" provisions).
 - b. Whether an Employment Tribunal in Scotland has jurisdiction to consider a claim under section 8 of the Protection from Harassment Act 1997.
 - c. Whether either response had a reasonable prospect of success.

Summary of the claimant's argument

5. The claimant relied on section 41 of the Equality Act 2010 but no other provision of Part 5 ("Work"). The claimant was very clear that he did not rely

on any other sections contained within Part 5 for the purposes of his claim in the Employment Tribunal, even though the first respondent conceded in its response that it was a trade organisation as defined by section 57.

5 6. Therefore, the claimant explicitly did *not* rely on section 53 ("Qualifications bodies") or section 57 ("Trade Organisations"). The link to Part 5 is important because section 120 of the Equality Act 2010 gives Employment Tribunals jurisdiction relating to a contravention of Part 5, or certain other sections relating to Part 5.

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7. As for section 41 ("Contract workers"), the claimant argued that both respondents were "principals" and that he was a "contract worker" for the purposes of that section. Alternatively, he argued that the second respondent was so closely associated with the first respondent that he could claim against it even if the tests in section 41 were not satisfied in relation to the second respondent. The claimant relied on principles that he said were to be derived from **Leeds City Council v Woodhouse and another** [2010] EWCA Civ 410.

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8. As for the Protection from Harassment Act 1997, the claimant relied on a short passage in **Veakins v Kier Islington** [2009] EWCA Civ 1288, which he referred to as a "binding precedent" that claims based on the Protection from Harassment Act 1997 can be brought in an Employment Tribunal. That case concerned an appeal from the decision of a Recorder sitting in the Brighton County Court. The relevant passage is paragraph 17 in which Maurice Kay LJ, giving the judgment of the court, made the following remarks.

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It follows from what I have said that I would allow this appeal, substitute a finding for the appellant on liability and return the case to Brighton County Court for damages to be assessed. I add these observations. Since *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613, it has become more difficult for an employee to succeed in a negligence action based on stress at work. It seems that this may be causing more employees to seek redress by reference to harassment and the statutory tort, although it is doubtful whether the legislature had the workplace in mind when passing an Act that was principally directed at "stalking" and similar cases. Nevertheless, there is nothing in the language of the Act which excludes workplace harassment. It should not be thought from this unusually one-sided case that stress at

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work will often give rise to liability for harassment. I have found the conduct in this case to be "oppressive and unacceptable" but I have done so in circumstances where I have also described it as "extraordinary". I do not expect that many workplace cases will give rise to this liability. It is far more likely that, in the great majority of cases, the remedy for high-handed or discriminatory misconduct by or on behalf of an employer will be more fittingly in the Employment Tribunal.

Reasoning

Jurisdiction in relation to the Protection from Harassment Act 1997

9. I made it clear at the start of the hearing that since an Employment Tribunal is a "creature of statute" it only has the jurisdiction conferred on it by statute, or sometimes statutory instruments made pursuant to statute. An Employment Tribunal has no "inherent jurisdiction", as some courts do. I said that it would be helpful if I could be taken to the statutory provisions which the claimant argued conferred the jurisdiction to hear civil claims for breach of the Protection from Harassment Act 1997. The claimant did not refer me to any. Briefly, he relied on The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, but I understood him eventually to accept that the point was misconceived because (a) he was not seeking to bring a claim for breach of contract and (b) he did not allege that he was an employee of either respondent.

10. With the greatest of respect to the claimant and his interesting argument, I think his reliance on the observation of Maurice Kay LJ in **Veakins** is misconceived and based on a misunderstanding of what was said.

a. First, **Veakins** was not a "binding precedent" on the point allegedly to be derived from it at all. In that case the litigation had been brought in a County Court, and not in an Employment Tribunal. The Court of Appeal was not concerned with jurisdictional questions in the Employment Tribunal at all and they did not arise on appeal, so any observations would not be binding on me, even if the Court of Appeal

in England and Wales could give a binding decision on a question of jurisdiction in Scotland.

5 b. Second, Maurice Kay LJ's comments were merely to the effect that it would be rare that mistreatment in the workplace would satisfy the definition of harassment in the Protection from Harassment Act 1997. It is tolerably clear that he was contrasting the sort of treatment that might amount to a breach of the Protection from Harassment Act 1997 with the general run of workplace harassment cases, which would not. When he said that those cases might more fittingly be brought in an
10 Employment Tribunal, he did not mean that they could be brought in an Employment Tribunal *under the Protection from Harassment Act 1997*. On the contrary, he was effectively saying that such complaints would have to be brought under the raft of discrimination legislation which was then in force, prior to the enactment of the Equality Act
15 2010. It is easy to see why "in the Employment Tribunal" might be convenient shorthand in 2009, before discrimination legislation was (mostly) consolidated into a single statute.

c. Even if the claimant were correct about the meaning of Maurice Kay
20 LJs observations, they could not confer jurisdiction on an Employment Tribunal. It is still necessary to identify the statutory provision that does so. It was not suggested at this hearing that the Protection from Harassment Act 1997 itself, the Employment Tribunals Act 1996 or any other statute did so. The words of Maurice Kay LJ in an appeal from a County Court claim cannot be a substitute. The Court of Appeal
25 was not construing a statutory provision which might confer jurisdiction on an Employment Tribunal in **Veakins**, rather it was concerned with the evaluation of evidence and the threshold of harassment. See for example paragraph 1 of the judgment.

30 11. Therefore, my conclusion is that the Employment Tribunal has no jurisdiction to consider claims under the Protection from Harassment Act 1997.

12. I understand that another Employment Judge has already reached that

conclusion in another unrelated claim brought by the same claimant. Apparently, that case awaits a r.3(10) hearing in the Employment Appeal Tribunal and the claimant has also made an application to the European Court of Human Rights.

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Contract workers – section 41 of the Equality Act 2010

13. All the main ingredients of the test in section 41(5), (6) and (7) of the Equality Act 2010 are missing.

10 a. The claimant accepted that he was not “employed by another person” (s.41(5)(a)), though he argued that he might be employed as a solicitor in the future. The statutory wording is in the present tense. Future possibilities do not amount to being “employed by another person” at the relevant time.

15 b. The claimant was not “supplied” to either respondent (s.41(5)(b) and (7)).

c. Even if there were the necessary “supply”, it was not “in furtherance of a contract” to which the alleged principal was a party (s.41(5)(b) and (7)). The only contract the claimant could identify was one of insurance. Even if either respondent were party to that contract of insurance, it has nothing to do with the supply of the claimant as a worker.

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d. Neither respondent made work available to the claimant (s.41(5)). Authorising someone to work in a particular capacity or regulating their profession is not the same thing as making work available.

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14. All those points are separate and essential aspects of the definition of “contract work”, “contract worker” and “principal”. The claimant’s argument would fail for any one of those reasons. I find that it fails for all of them. On the claimant’s pleaded case, I find that neither respondent fell within the definition of “principal” for the purposes of section 41 of the Equality Act 2010. That gateway to Part 5 of the Equality Act 2010 and the Employment Tribunal jurisdiction conferred by section 120 is not open to the claimant.

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15. **Leeds City Council v Woodhouse & another** [2010] EWCA Civ 410 does not assist the claimant. It is not authority for the proposition that it might be possible to bring a claim against a body under section 41 even if the tests in section 41 are not satisfied, merely because of a close connection with a body to which section 41 applies. In any event, the claimant accepted that if the first respondent fell outside the scope of section 41 then the claim against the second respondent based on “close connection” must also fail.

Human rights arguments

16. The claimant also advanced a human rights argument, which was not always focussed in a way that was easy to understand. I approach matters in the following way.

- a. I accept that an Employment Tribunal is a public body, bound by section 6 of the Human Rights Act 1998 to act in a way compatible with Convention rights.
- b. I also accept that I am under the duty in section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way which is compatible with Convention rights (the duty of “conforming interpretation”).
- c. I do not accept the suggestion that I could make a declaration of incompatibility under section 4 of the Human Rights Act 1998 because that power is reserved in Scotland to the High Court, the Court of Session and the Supreme Court.
- d. I do not accept that Article 14 ECHR gives the claimant a freestanding right to complain of discrimination. Article 14 is concerned with the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. Therefore, it complements and attaches to the other substantive provisions of the Convention and the Protocols.
- e. I accept that the claimant’s Article 6 rights are engaged by the proceedings in this Tribunal.

17. However, I do not accept that Article 6 can be relied on to create new substantive rights where they do not otherwise exist, such as a potential claim against a particular type of respondent. I do not accept that Article 6 can be
5 relied on to confer jurisdiction on a Tribunal where Parliament has chosen not to do so. No authority was cited for either proposition, and given that: (a) the Equality Act 2010 allocates jurisdiction for breach of its provisions in a clear and comprehensive manner; and (b) it is well established that civil claims under the Protection from Harassment Act 1997 can be brought in the Sheriff
10 Courts, I find that the claimant's Article 6 rights and the right to an effective remedy are unimpaired. His Article 6 rights are engaged but not breached.

18. Even if I had found otherwise, I would not have been prepared to read provisions conferring jurisdiction on an Employment Tribunal into the
15 Protection from Harassment Act 1997 because that would "go against the grain" of existing legislation and would amount to impermissible judicial legislation. In my judgment, applying the principles in cases such as **Ghaidan v Godin-Mendoza** [2004] UKHL 30, it must be left to Parliament to decide who can be sued for discrimination and, if so, the fora in which they can be
20 sued. Those are policy questions for Parliament, not questions of interpretation for a judge. Even if the current legislative framework failed to give effect to the claimant's Article 6 rights, I find that a conforming interpretation under section 3 would not be possible.

25 *The application to strike out the responses*

19. I will deal with this shortly given my other conclusions. It is not possible to say, if the cases are taken at their pleaded highest, that the responses, or any part of them, have no reasonable prospect of success. The claimant did
30 not really engage with that test and instead used his time to explain his own case. He did not explain why the defences, or any aspect of them, have no reasonable prospect of success.

20. The overall merits of the case currently bristle with disputes of fact and possibly law. To pick the example of the indirect discrimination claim brought under section 19 of the Equality Act 2010, it is not clear or admitted that the alleged PCP exists, that there is individual disadvantage, that there is group disadvantage, or that there is the necessary “particular disadvantage”. The appropriate pool for comparison is debateable, and the parties have not even begun to explore the possibility of justification defences.
21. That leads onto another point. This case has not yet had a case management hearing. The issues have not yet been defined or clarified. It is certain that further specification of the claim would be required, followed by consequential further details of the responses. It is well established that before contemplating striking anything out, a Tribunal must be clear about the shape of the claim or, by extension, the response. This case is a long way from that stage.
22. It would be wrong in principle to strike out the whole or any part of the responses simply because the claimant has a firm conviction that his claim should succeed. There would first be much to clarify, and then much to decide after hearing evidence. The claimant’s application for the responses to be struck out is therefore refused.

Conclusion

23. Given my conclusions on the preliminary issues of jurisdiction the claim must be dismissed. I do not accept the claimant’s argument that a finding that the Tribunal lacks jurisdiction consequently deprives the Tribunal of the power to dismiss the claim. If that were right then no claim could ever be dismissed for lack of jurisdiction, and such claims would live on indefinitely, never determined on their merits but never dismissed either.
24. Although the second respondent’s grounds of resistance referred to a possible application for expenses, neither respondent made an application of

that sort at the hearing. The parties are no doubt aware of the time limit in rule 75(1) of the Employment Tribunal Procedure Rules 2024.

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Employment Judge M Whitcombe

Date of Judgment

26 February 2025

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and copied to parties**

27 February 2025