



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4123577/18

Held in Dundee on 13 June 2019

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Employment Judge P O'Donnell

Ms S A Wilson

**Claimant
In Person**

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20 **Scottish Midland Co-operative Society Ltd**

**Respondent
Represented by
Mr P Singh
Law at Work**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that :-

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1) The Respondent's application for strike-out is refused in its entirety.

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2) The Respondent's application for a deposit order is granted in respect of the claims for Breach of the duty to make reasonable adjustments under sections 20 & 21 of the Equality Act 2010 and discrimination arising from disability under section 15 of the 2010 Act. The Claimant is ordered to pay a deposit of £50 (£25 for each claim) in order to proceed with these claims.

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3) The Respondent's application for a deposit order in respect of the remaining claims is refused.

4) The Tribunal makes Orders for the Claimant to provide further specification of certain information in relation to her claims as set out below.

E.T. Z4 (WR)

REASONS

Introduction

1. The Claimant has brought complaints of direct race discrimination, harassment on the grounds of race, indirect disability discrimination, discrimination arising from disability and breach of the duty to make reasonable adjustments, all under the Equality Act 2010 (“the 2010 Act”).
2. Those claims are resisted by the Respondent. At a previous Case Management Preliminary Hearing, the Respondent’s agent made an oral application for the claims to be struck-out failing which for a deposit order to be made.
3. The present hearing has been listed to determine that application.
4. The Respondent produced a copy of the joint bundle being prepared for the full hearing of the case and references to documents below are references to the page numbers in that bundle.

The application by the Respondent

5. At the outset of the hearing, the Tribunal sought clarification from the Respondent’s agent as to which claims the Respondent sought to have struck out (or to have a deposit order made) and the grounds on which the application was made.
6. The Respondent’s agent clarified that strike-out or a deposit order was sought in respect of the following claims:-
 - a. Harassment on the grounds of race under section 26 of the 2010 Act in respect of all the allegations of harassment
 - b. Direct race discrimination under section 13 of the 2010 Act in respect of all allegations of direct race discrimination
 - c. Indirect disability discrimination under section 19 of the 2010 Act
 - d. Breach of the duty to make reasonable adjustments under sections 20 & 21 of the 2010 Act in respect of all alleged breaches
 - e. Discrimination arising from disability under section 15 of the 2010 Act only in so far as that relates to the Claimant’s dismissal
7. The ground on which the application was made was that the claims had no reasonable prospects of success in terms of Rule 37(1)(a) of the Rules of Procedure.
8. In respect of the application for the deposit order, the Respondent sought a deposit in relation to each claim.

Respondent's submissions

9. The Respondent's agent made the following submissions.
10. She submitted that there was a two part test for the Tribunal to apply; whether the grounds in Rule 37 have been established and, if so, whether the Tribunal should exercise its discretion to strike-out all or part of the claim.
11. In respect of the indirect disability discrimination claim, it was submitted that the policy, practice or criterion which the Claimant said had been applied was the discontinuation of the Equal Opportunities Monitoring form but that it was not clear how this disadvantaged the Claimant or others with her disability.
12. In any event, it was submitted that the form had not been removed, it was simply being reviewed to ensure compliance with data protection legislation.
13. In respect of the alleged breach of the duty to make reasonable adjustments, it was submitted that the adjustment being suggested by the Claimant was the provision of extra support or training to relieve the stress she faced when trying to learn the job. However, the Claimant had not specified how this would alleviate her stress and had not produced evidence in support of this. In particular, it was said that the Claimant had not produced medical evidence about how her chronic pain syndrome was impacted by stress.
14. It was submitted by the Respondent's agent that there was no evidence to support the claim of discrimination arising from disability; the Claimant had produced no evidence to link her disability to the issue of the cash shortages; the Respondent also disputed that these were the reason why the Claimant had not passed her probation leading to her dismissal was sustained performance issue.
15. The Respondent's agent made reference to page 46 of the bundle which set out the five instances of alleged racial harassment. It was submitted that in relation to none of these was it reasonable for the Claimant to consider that there was an unlawful purpose or effect:-
- a. In relation to the first incident, there was no evidence that the Claimant's manager had laughed and, in any event, a laugh could not amount to harassment.
 - b. In relation to the second and third incidents, there was insufficient specification.
 - c. The fourth incident was admitted but this related to customer complaints and the Claimant's attitude to customers and could not amount to harassment.

d. The fifth incident was not connected to race and was intended to help the Claimant improve her performance. Reference was to *Richmond Pharmaceutical v Daliwall*.

5 16. In respect of the claim for direct race discrimination, it was submitted that there was no specification of the claim and no comparator identified. In any event, the reason for the Claimant's dismissal was her attitude to customers and her performance. There was no arguable case in law.

10 17. It was submitted that all the claims advanced by the Claimant were, at their highest, speculative.

18. It would be in keeping with the Overriding Objective for the claims to be struck out as it would save resources and avoid delay.

15 19. If the Tribunal did not consider strike-out to be appropriate then the Respondent's Agent submitted that a deposit order should be considered:-

a. The claims had little reasonable prospects of success.

20 b. The Claimant had been given an opportunity to identify evidence and she had not done so.

c. The claims, taken at their highest, were very weak.

d. A deposit order was sought for each claim separately.

25 20. In response to a point raised by the Judge, the Respondent's agent made no objection to the suggestion that if specification was the issue then it would be more appropriate for an Order for further specification to be made as an alternative to strike-out or a deposit order.

Claimant's submissions

30 21. The Claimant made the following submissions.

22. The Claimant is not a legal representative.

35 23. She finds the Respondent's attitude surprising given the outcome of her appeal.

24. The customer service issue had been resolved at her second probation review and she made reference to page 151 of the bundle which was a reference from a previous employer stating there were no issues with her customer service.

40 25. There was no documentation of customer complaints just as there was no documentation of her raising issues.

- 5 26. The acts of racial harassment were a continuing act but the Respondent is dealing with them separately rather than as a whole act. Her manager failed to document these and used the wrong forms; she admitted that she did not know what she was doing. The term "Montrosian" was used to give advice on dealing with customers.
- 10 27. In relation to the claim of direct race discrimination, the Claimant submitted that she was perceived as being posh and stuck-up due to her English accent. Caste discrimination is relevant in the UK and being "posh" is a reference to caste. The Claimant felt that she was dismissed because she "didn't fit in".
- 15 28. If the Claimant had been told there was no Equal Opportunities monitoring form then she would have known to have put details of her disability in writing rather than having to do this verbally and having it denied by the Respondent right up to the last internal hearing. The Claimant believes that this would disadvantage disabled people.
- 20 29. The claim for discrimination arising from disability related to the cash errors and the stress that the Claimant felt when these were attributed to her. It was not her case that the errors arose from her disability but rather that being accused of these lead to stress which impacted on the effects of her disability.
- 25 30. The Claimant also did not object to the suggestion of an Order for further specification as an alternative to strike-out or deposit order although she did feel that enough specification had been provided.
- 30 31. In respect of her ability to pay a deposit order, the Claimant confirmed that she had no savings and was in receipt of Universal Credit of £600 a month of which she pays £250 on her mortgage and £100; her other outgoings exceed her income. A deposit order would prevent her from proceeding with her claim.

Relevant Law

32. The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

35 *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—*

- 40 (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;*

(c) *for non-compliance with any of these Rules or with an order of the Tribunal;*

(d) *that it has not been actively pursued;*

5 (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

10 33. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

15 34. Similarly, In *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

20 35. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

25 36. The Tribunal also have a power under Rule 39 to make a deposit order:-

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.

30 Decision

35 37. Before turning to addressing the applications by the Respondent in respect of the specific claims, the Tribunal will make address issues of general application.

40 38. Much of the Respondent's submissions were focussed on the lack of specification by the Claimant or that she had not brought evidence to support her claims. The Tribunal gave no weight to these submissions insofar as they related to the issue of whether the claims should be struck-out or whether a deposit order should be made.

39. A lack of specification is not grounds for claims to be struck-out or a deposit order to be made; the appropriate course of action is, if the Respondent feels they do not have fair notice of the case they have to meet, for the Respondent to seek such specification, either on a voluntary basis or by way of an Order.
- 5 The Tribunal noted that no such specification has been sought by the Respondent since the last preliminary hearing and the further particulars which the claimant provided.
40. In the event, where the Tribunal does consider, in respect of certain of the claims brought by the Claimant, that further specification of the claims would be of assistance to the Tribunal which hears the case, the Respondent and, indeed, the Claimant then it has made an Order on its motion for such specification.
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41. Similarly, the Tribunal considered that the criticism of there being an alleged lack of evidence produced by the Claimant had no bearing on its decision. The Tribunal, in considering the application by the Respondent, requires to take the Claimant's case at its highest and assume she will make out the facts she is offering to prove. The Tribunal heard no evidence at the hearing and is not in a position to decide on the quality of any evidence that may be lead at the full hearing of the case.
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42. The Tribunal also reminded itself of the draconian nature of the power to strike-out and the fact that it should be exercised very carefully especially in claims of discrimination.
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43. Turning now to each of the claims which are the subject of the application by the Respondent.

Indirect disability discrimination

- 30 44. The Claimant's case in relation to indirect discrimination is based on the removal of the Respondent's Equal Opportunities monitoring form and the fact that this would have been a mechanism for her to document her disability.
45. There is, of course, no absolute legal obligation on the Respondent to use such a form and the fact that they do not use one is not inherently unlawful. However, if the Claimant is able to prove that the removal of the form would disadvantage people with her disability as a group and that it disadvantage her individually then there would, on the face of it, be a case of indirect disability discrimination. The question of whether such disadvantages exist are a matter for the Tribunal at the full hearing to determine having heard all the evidence and made findings of fact.
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46. Similarly, the Tribunal notes the Respondent's explanation for the temporary removal of the form and it may be that, having heard all the evidence and submissions, the Tribunal at the full hearing would find that this provides objective justification. However, that is matter that could only be determined after evidence is heard and findings of fact made.

47. In these circumstances, the Tribunal does not consider that the claim of indirect disability discrimination has no reasonable prospects of success nor that it has little reasonable prospects of success. The Respondent's applications under Rules 37 and 39 in respect of these claims are refused.

Discrimination arising from disability & breach of duty to make reasonable adjustments

48. The Tribunal considered that it was appropriate to consider these claims together as they arise from effectively the same issue, namely, the effect on the Claimant (and, specifically, the effect on the symptoms of her disability) arising from the allegations of cash errors and other performance issues.

49. The claim in relation to the breach of the duty to make reasonable adjustments relates to an alleged failure by the Respondent to provide training and support to the Claimant that would avoid her making alleged cash errors. The Claimant pleads that this caused her stress which exacerbated the symptoms of her disability.

50. Similarly, the claim of discrimination arising from disability is based on the stress caused to the Claimant by the allegations of cash errors and that this negatively impacted on her health and the effects of her disability. In particular, the Tribunal took note of the submission made at the hearing that the Claimant was not alleging that any cash errors were caused by her disability but that the stress negatively impacted on the symptoms of her disability.

51. In the Tribunal's view, if this is how the Claimant seeks to advance her case then she seeks to "*put the cart before the horse*"; a claim under section 15 of the 2010 Act requires the something arising from disability to be the cause of the unfavourable treatment rather than the treatment impacting on the disability; similarly, a claim for breach of the duty to make reasonable adjustments requires the Claimant to be put at a disadvantage as a disabled person by the policy, criterion or practice applied to her for the duty to be engaged.

52. The Tribunal considers that the difficulty with these claims is that the Claimant (for understandable reasons given she is a litigant in person) has not framed her case by reference to the statutory definition of these types of discrimination.

The Tribunal considers that it is appropriate to exercise its power under Rule 29 to make an Order for the Claimant to provide further information about these claims as set out below.

- 5 53. However, with that being said, the Tribunal does consider that both these claims have little prospects of success for the reasons set out above and, in particular, that the Claimant does not seek to argue that the unfavourable treatment to which she alleges she was subjected did not arise from her disability nor that she was disadvantaged as a disabled person in respect of
10 the alleged breach of the duty to make reasonable adjustments.

Racial harassment

- 15 54. The Tribunal considered that if the Claimant makes out the facts she offers to prove in relation to the allegations of racial harassment then there are reasonable prospects that the Tribunal at the full hearing, having heard all the evidence, would find that these were matters which met the test under section 26 of the 2010 Act.

- 20 55. In particular, these all relate to the alleged perception that she was English and so would relate to her race (or perceived race). Further, such comments may well have the effect (and possibly the purpose) of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, particularly when her view of these comments are taken into account.

- 25 56. In these circumstances, the Tribunal does not consider that the claim for racial harassment has little or no reasonable prospects of success and so the Respondent's applications in respect of this claim are refused.

- 30 57. However, the Tribunal does consider that some further specification of the incidents of harassment would be of assistance to the parties and the Tribunal. The Tribunal, therefore, makes an Order under Rule 29 on its own motion for the Claimant to set out further specification as set out below.

Direct race discrimination

- 35 58. Again, the Tribunal was of the view that if the Claimant proves the facts that she is offering to prove then it cannot be said that there is little or no reasonable prospects of the Tribunal at the full hearing finding that the Claimant was not dismissed on the grounds of race.

- 40 59. The Tribunal was conscious that such discrimination is rarely overt or even conscious. Very often discrimination can arise from a perception that

someone does not “fit in” and, in the Tribunal’s view, if the Claimant’s case is taken at its highest then an inference could be drawn that the Claimant did not fit in and that this related to her race (or perceived race).

5 60. Ultimately, it would be for the Tribunal at the full hearing having heard all the evidence including any evidence the Respondent might lead in order to rebut any shifting burden of proof to make a determination. However, it cannot be said that this claim has little or no reasonable prospects.

10 61. In these circumstances, the Respondent’s applications in respect of this claim are refused.

Amount of deposit order

15 62. Having decided that it is appropriate for the Claimant to pay a deposit as a condition of continuing to advance the claims of discrimination arising from disability and the breach of the duty to make reasonable adjustments, the Tribunal requires to consider the amount which the Claimant requires to pay.

20 63. The Tribunal has taken account of the information the Claimant has supplied about her income and expenditure, in particular the fact that she has very limited disposable income.

25 64. The Tribunal has balanced this against the need for the amount to reflect the fact that the Tribunal considers the relevant claims to have little prospects of success.

65. The Tribunal has come to the view that an appropriate amount for the Claimant to pay in relation to each of the two claims for which the deposit order is made is £25 for each claim, amounting to £50 in total.

Case management order

30 66. As set out above, the Tribunal considers that further specification of certain matters in relation to certain claims would assist the parties and the Tribunal in dealing with the claims at the full hearing.

35 67. The Tribunal, therefore, exercises its power under Rule 29 to make the following case management orders. The Claimant is ordered to provide the information set out below within **21 days** of the date on which this Judgment is sent to the parties.

40 68. In respect of the claim of discrimination arising from disability, the Claimant is ordered to provide the following specification:-

a. What is the unfavourable treatment of which she complains?

b. What is the “*something arising in consequence*” of her disability which she says caused the unfavourable treatment?

5 69. In respect of the claim of breach of the duty to make reasonable adjustments, the Claimant is ordered to provide the following specification:-

- a. What is the policy practice or criterion which the Claimant says the Respondent applied to her?
- 10 b. On what basis does the Claimant say that this placed her at a substantial disadvantage as a disabled period?
- c. What adjustments does the Claimant say that the Respondent should have made?
- 15 d. On what basis does the Claimant say that these adjustments would have avoided the substantial disadvantage identified in response to b above

70. In respect of each incident of racial harassment on which the Claimant relies, the Claimant is order to specify the following information:-

- 20 a. On what date did the incident occur?
- b. Who carried out the harassment?
- c. What conduct does the Claimant say amounted to harassment?

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40 **Employment Judge: Peter O'Donnell**
Date of Judgment: 21 July 2019
Date sent to Parties: 23 July 2019