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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4111168/2021**

**Held on 21 January 2022 (By Cloud Video Platform)**

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**Employment Judge: F Eccles**

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**Mr I Mkwebu**

**Claimant  
In Person**

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**Ms F Mundy**

**First Respondent  
Represented by:  
Mr D McFadzean -  
Solicitor**

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**The ABC Trust**

**Second Respondent  
(as above)**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is (i) it does not have jurisdiction to consider the part of the claim that predates 9 March 2020; (ii) to grant the claimant leave to amend his claim by adding the part of the proposed amendment that is identified as Complaint 10 and concerns a complaint of victimisation under Section 27 of the Equality Act 2010 & (iii) not to strike out the claim under Rule 37 of

Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2103.

## REASONS

### BACKGROUND

- 5 1. The claim was presented on 30 August 2021. The claimant claims direct race discrimination, harassment and victimisation under the Equality Act 2010. It is the eleventh claim brought by the claimant against the second respondent and other parties since December 2019. The ten earlier claims are being considered together. They are sisted pending proceedings before the  
10 Employment Appeal Tribunal and the appointment of an Executor for a deceased respondent. None of the previous claims were brought against the first respondent. The claimant sought to add the first respondent by amendment to the combined claims. The application was refused by Judgment dated 29 July 2020 (paragraphs 98 to 100).
- 15 2. All heads of claim are resisted. In their response, accepted by the Tribunal on 30 September 2021, the respondents identified preliminary issues concerning the jurisdiction of the Tribunal, including time bar.
3. At a case management preliminary hearing held on 29 October 2021, the Employment Judge ordered that there should be a preliminary hearing to  
20 consider a number of issues including whether the claimant should be allowed to add a claim of detrimental treatment for making protected disclosures under Section 43B of the Employment Rights Act 1996. The Employment Judge identified the following issues for consideration at today's preliminary hearing:-
- 25 1) Whether the claims made are within the jurisdiction of the Employment Tribunal having regard to section 123 of the Equality Act 2010;

- 2) Whether the claim against the first respondent should be struck out under Rule 37, with the first respondent alleging that it is an abuse of process and accordingly vexatious;
  - 3) Whether the Tribunal does not have jurisdiction over the claims against the second respondent, or some of those claims, given the date of the Early Conciliation Certificate in relation to them;
  - 4) Whether the claims should be struck out as being pursued unreasonably, or as having no reasonable prospects of success under Rule 37;
  - 5) Whether the claimant should be permitted to amend his claim and if so, on what terms &
  - 6) Such other matters that the Tribunal may consider apt to address, which may include arguments in relation to legal professional privilege claimed by the respondents.
4. On 30 November 2021 the claimant provided the Tribunal with further and better particulars. A revised version was provided on 1 December 2021 with the addition of a paragraph referring to protected disclosures. Parties agreed that the further particulars (as revised) should be treated as the claimant's application for leave to amend. The respondents provided a response to the proposed amendment on 14 January 2022. In advance of today's preliminary hearing the respondent identified documents which were considered relevant to the issue of amendment. The claimant lodged a number of documents, the admissibility of which was challenged by the respondents on the grounds that they are privileged.

## DISCUSSION & DELIBERATIONS

5. At today's preliminary hearing, which was held remotely by CVP, the claimant represented himself. The respondents were represented by Mr D McFadzean, Solicitor. The Tribunal considered each of the issues identified above as follows;

**Is the claim made within the jurisdiction of the Employment Tribunal having regard to Section 123 of the Equality Act?**

6. As referred to above, the claimant is claiming direct race discrimination, harassment and victimisation under the Equality Act 2010. In terms of Section 123(1) of the Equality Act 2010, the above claims may not be brought (a) after the end of the period of 3 months starting with the date of the act to which the complaint relates or (b) such other period as the Employment Tribunal thinks is just and equitable. In terms of Section 123(3) of the Equality Act 2010, conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it. In terms of Section 123(4) of the Equality Act 2010, in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something (a) when they do an act inconsistent with doing it or (b) if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.
7. The period of 3 months can be extended by early conciliation. For the first respondent, early conciliation commenced on 23 August 2021 and the certificate was issued on 27 August 2021. For the second respondent early conciliation commenced on 1 October 2019 and the certificate was issued on 13 November 2019. As referred to above, the claim was presented on 30 August 2021.
8. In the paper apart to his claim, the claimant refers to alleged acts of discrimination on various dates between 26 July 2019 and 23 August 2021. The claimant complains of the first respondent denying access to documents from 9 March 2020. The second respondent accepts liability for the first respondent's alleged conduct, which is denied. Before 9 March 2020 the claimant complains of alleged conduct on the part of the respondents in relation to his employment and its termination. From the information before it, the Tribunal was not persuaded that it has jurisdiction to consider the parts of the claim that predate 9 March 2020. The Tribunal was not persuaded that the alleged acts before 9 March 2020 amount to conduct extending over a

period. The alleged acts, the last of which occurred on 6 March 2020 when a grievance report is said to have been produced, are not sufficiently linked to the alleged ongoing act of denying access to documents to be part of the same continuing act. They are acts of discrimination which are alleged to have occurred on various dates more than 3 months before the presentation of the claim and from the information before the Tribunal do not amount to a continuing act either together or along with the alleged denial of access by the claimant to documents from 9 March 2020 to 23 August 2021.

9. As referred to above, the Tribunal has the discretion to extend the time for presenting a claim in circumstances where it is just and equitable to do so, The Tribunal was not persuaded that in this case it was just and equitable to extend the time limit to allow the claimant to bring a claim in relation to the acts of discrimination said to have been done before 9 March 2020. In reaching the above decision, the Tribunal had regard to the relative prejudice to the parties. The acts before 9 March 2020 about which the claimant complains are said to have been done on various dates, some as long ago as 17 months before this claim was presented. They relate to the period during which he was employed by the second respondent. The claimant has already brought 10 other claims in relation to alleged discrimination while employed by the second respondent. (His employment with the second respondent ended on 7 May 2020). Conduct about which the claimant complains relating to his grievance and termination of his employment has been added by amendment to the combined claims. The Tribunal was not persuaded by the claimant's submission, referring to the case of **Ladd v Marshall 1954 3 All ER 745, CA**, that he should be permitted to bring a further claim for the period already covered in existing claims as he has only recently seen the documents provided by the respondents and which he claims support his allegations of discrimination. Subject to privilege, the claimant will be able to rely on these documents to support his existing claims of discrimination. The Tribunal was not persuaded that he needs to bring another claim to do this.

10. The first respondent has already successfully opposed an application to add her as a party to claims concerned with alleged acts of discrimination during

his employment with the second respondent. Adding the first respondent to those claims by amendment was not considered to be in accordance with the overriding objective. The second respondent does not seek to rely on the statutory defence under Sections 109 of the Equality Act 2010 in response to the alleged conduct of the first respondent, which is denied. In all the circumstances, the prejudice to the claimant of not extending the time limit will be limited. The second respondent is already defending the 10 combined claims concerned with the period covering his employment and will suffer the prejudice of additional cost if the time for bringing that part of this claim is extended.

11. The Tribunal was not persuaded that the conduct that the claimant sought to add by amendment, and was said to have occurred before 9 March 2020, was potentially relevant to the issue of whether the original claim was in time. The Tribunal was not persuaded that the proposed amendment if granted would have added conduct extending over a period before 9 March 2020.

12. As regards the alleged conduct dating from 9 March 2020 to 23 August 2021 of denying the claimant access to documents, the Tribunal was satisfied that this could potentially amount to a continuing act extending over a period. It is identified by the claimant as victimisation under Section 27 of the Equality Act 2010. It is a matter that is fact specific and about which the Tribunal should hear evidence, for example, about when the claimant sought access to documents and when the respondent is said to have denied his requests. It is claimed that it was not until 23 August 2021 that the first respondent finally provided the claimant with all of the documents that he sought from the respondents. The Tribunal concluded that the claim against the respondents concerning conduct from 9 March 2020 (which is denied) could potentially be in time as a continuing act and the Tribunal should hear evidence on the complaint before determining whether all or some of it is in time.

**Should the claim against the first respondent be struck out under Rule 37, with the first respondent alleging that it is an abuse of process and accordingly vexatious?**

- 5 13. In terms of Rule 37(1)(a) of the Rules of Procedure 2013, a Tribunal may strike out all or part of a claim on the grounds that it is scandalous, vexatious or has no reasonable prospect of success. The respondents submit that the claim should be struck out as it is an abuse of process and accordingly vexatious.
- 10 14. The respondents submit that the claim should be struck out against the first respondent as the claimant has already attempted to bring proceedings against them by amending the existing claims. The application was refused on the grounds that to do so would be contrary to the overriding objective. In the above circumstances, submitted the respondents, the present claim is an abuse of process. The claimant referred the Tribunal to Lord Bingham's  
15 description of vexatious proceedings in the case of **Attorney General v Barker 2000 1 FLR 759**. The claimant disputed that his claim against the first respondent had "*little or no basis in law (or at least no discernible basis)*" and amounted to an abuse of process. In terms of **Barker (supra)** the Tribunal was not persuaded that the claim against the first respondent for the period 9  
20 March 2020 to 23 August 2021 should be struck out as amounting to an abuse of process and therefore vexatious. The Tribunal was also not persuaded that the claim has no basis in law or that the claimant has brought the claim against the first respondent with the intention of subjecting her to unnecessary  
25 inconvenience, harassment and expense. Similarly, the Tribunal was not persuaded that the effect of the proceedings on the first respondent is out of all proportion to any gain the claimant is likely to accrue from bringing the claim. This is not a case in which the earlier claims have been struck out as having no reasonable prospect of success.
- 30 15. When deciding not to strike out the claim, the Tribunal has taken into account that the claimant was not allowed to add the first respondent to the combined claims. The Tribunal was not persuaded that this should prevent the claimant

5 from bringing separate proceedings in relation to the allegation that the first  
respondent discriminated against him by denying him access to documents  
between 9 March 2020 to 23 August 2021. The Tribunal does not understand  
that these allegations formed the basis of the previous amendment  
10 application. Bringing proceedings against a party, particularly where they are  
concerned with specific complaints against the party in question, following  
refusal to add them to separate proceedings is not in itself an abuse of  
process. The Tribunal also took into account the respondents' submission  
that the second respondent does not advance a statutory defence in relation  
15 to the alleged acts/omissions of the first respondent (which are denied) and it  
is therefore unnecessary to include the first respondent as a party to these  
proceedings. This factor whether taken alone or together with all the other  
circumstances of the case, did not persuade the Tribunal that there are  
grounds to find that the claim is an abuse of process and should be struck out  
as being vexatious.

**Does the Tribunal have jurisdiction over the claims against the second respondent, or some of those claims, given the date of the Early Conciliation Certificate in relation to them?**

16. In terms of Section 18A and 18B of the Employment Tribunals Act 1996 and  
20 the Early Conciliation Rules of Procedure, before a claimant presents an  
application to the Tribunal relating to any matter, they must contact ACAS,  
provide prescribed information to ACAS and obtain an early conciliation  
certificate from ACAS. It is not in dispute that the claimant complied with the  
above procedure in relation to the first respondent. It is the second  
25 respondents' position that the early conciliation certificate relied on by the  
claimant to bring proceedings against them is invalid, or at least irregular, as  
it has been relied upon already by the claimant to bring earlier claims.

17. As referred to above, the second respondent contacted ACAS on 1 October  
2019 and the early conciliation certificate was issued on 13 November 2019.  
30 The Tribunal was not persuaded that the claimant was not entitled to rely on  
the above certificate to bring the present claim against the second  
respondent. The previous claims brought by the claimant against the second



respondent concern allegations of discrimination including harassment and victimisation. Use of an early conciliation certificate is not necessarily limited to events that pre-date it. The claimant referred the Tribunal to the case of **Science Warehouse Ltd v Mills 2016 ICR 252, EAT** in which the EAT held that early conciliation procedure in relation to any “matter” should be given a broad interpretation. The matters raised in this claim cannot be said to be unrelated to the matters raised in the previous claims. They both concern matters of alleged acts of discrimination relating to the claimants’ employment by the second respondent. It is the second respondent’s position that they will accept liability for any acts of discrimination by the first respondent (which are denied) as a joint party to the proceedings. There is no dispute in respect of the early conciliation certificate for the first respondent. In all the circumstances, the Tribunal was not persuaded that it does not have jurisdiction to consider the claim against the second respondent given that date of the early conciliation certificate relied on by the claimant.

**Should the claims be struck out as being pursued unreasonably, or as having no reasonable prospects of success under Rule 37?**

18. In terms of Rule 37(1)(a) of the Rules of Procedure 2013, a Tribunal may strike out all or part of a claim on the grounds that it is scandalous, vexatious or has no reasonable prospect of success. In terms of Rule 37(1)(b) the Tribunal may strike out a claim on the grounds that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious. For the reasons given above, the Tribunal was not persuaded that the claim should be struck out on the grounds that the claim is vexatious. Similarly, the Tribunal is not persuaded that it should be struck out on the grounds that the claimant’s conduct in bringing this claim is scandalous or unreasonable.

19. As regards prospects of success, the claimant referred the Tribunal to the case of **Anyanwu v South Bank Student Union 2001 ICR 391** and in particular paragraph 24 where Lord Steyn observes that “*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.”* This is not something with which the respondents, in general terms, disagree and it was not disputed that a Tribunal should be reluctant to strike out a claim of discrimination before having the opportunity to hear evidence on the facts of the case.

- 5 20. As Lord Hope stated at paragraph 37 of ***Anyanwu*** (*supra*) claims of discrimination, “*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*
- 10 *its decision on 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”*. This is not a case in which the Tribunal, having considered all the information before it can say with certainty that it has no reasonable prospect of success. The Tribunal has already decided that it does not have jurisdiction to consider
- 15 that part of the claim that pre-dates 9 March 2020. Guided by the case of ***Anyanwu*** (*supra*) and while not proceeding on the basis that a claim of discrimination can never be struck out as having no reasonable prospect of success, the Tribunal decided that in this case it would be contrary to the interests of justice to strike out the claim in respect of which the Tribunal has
- 20 jurisdiction before allowing the claimant to lead evidence.

**Should the claimant be permitted to amend his claim and if so, on what terms?**

21. The claimant sought to amend his claim in terms of the further particulars provided to the Tribunal on 30 November 2021 and subsequently amended on 1 December 2021. The claimant sought to add a claim of detrimental
- 25 treatment for making protected disclosures in terms of Section 47B of the Employment Rights Act 1996. The proposed amendment consisted of 10 complaints.
22. When deciding whether to grant or refuse the application for leave to amend, the Tribunal had regard to the guidance in the case of ***Selkent Bus Company v Moore*** 1996 ICR 836 including consideration of (i) the nature of the
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amendment; (ii) the applicability of time limits and (iii) the timing and manner of the application. The application sought to add further particulars of existing claims and a new claim under Section 47B of the Employment Rights Act 1996. In terms of the applicability of time limits, as referred to above, the Tribunal was not persuaded that it had jurisdiction to consider the part of the claim that was concerned with alleged conduct that predate 9 March 2020 and was not persuaded that, if allowed, the proposed amendment would have changed that decision. The Tribunal was also not persuaded that it was just and equitable to extend the time limit for those claims that are said to have occurred before 9 March 2020 and to which the claimant sought to add further particulars by amendment. The claimant has 10 other claims covering the period in question. He has already complained of direct discrimination, harassment and victimisation in those claims. He has already been granted leave to amend those claims to add complaints of alleged discrimination to the date of his dismissal on 7 May 2020. The prejudice to the claimant of refusing the application for leave to amend will be limited by the existence of his 10 other claims. The second respondent will incur inevitable expense if they have to defend another claim covering the same or very similar complaints.

23. The application to add a complaint of detrimental treatment under Section 47B of the Employment Rights Act 1996 refers to protected disclosures that are said have been made in October 2019 and 22 June 2020, more than 13 months before the claim was presented. Having regard to the information before it, including the paper apart to the claim, the Tribunal was satisfied that the claimant sought to add a new claim by amendment. The respondent submitted that the claimant has been allowed previous opportunities to apply to amend his existing claims and to identify all claims that he seeks to bring. The claimant has not persuaded the Tribunal that it was not reasonably practicable for him to have presented a claim of whistleblowing before presenting this claim. In terms of prejudice, the claimant already has claims of victimisation based on alleged protected acts that he identifies as

the same or similar to the alleged protected disclosures. He refers to bringing the claim after the respondents provided him with documents. Subject to privilege, the claimant will be able to rely on those documents to support his claim of victimisation. The Tribunal was not persuaded that he needs to bring a claim under Section 47B of the Employment Rights Act 1996 to do this or that it would be in the interests of justice to allow him to add such a claim by amendment.

24. In all the circumstances therefore and having regard to the balance of prejudice to the parties and the interests of justice, the Tribunal was satisfied that the claimant's application for leave to amend should be granted to the extent as it is concerned with the alleged denial by the respondents to allow him access to documents from 9 March 2020 onwards amounting to victimisation under Section 27 of the Equality Act 2010 and as detailed in Complaint 10 of the proposed amendment. Apart from Complaint 10 and in so far as it relates to a complaint of victimisation, the proposed amendment is refused including the application to add a claim of detrimental treatment for making protected disclosures under Section 47B of the Employment Rights Act 1996.

**Are there other matters that the Tribunal may consider apt to address, which may include arguments in relation to legal professional privilege claimed by the respondents?**

25. The claimant seeks to rely on documents to prove his claims which the respondents claim are inadmissible. They claim that the documents are privileged, in particular that they contain legal advice and correspondence with ACAS.

26. The Tribunal decided that whether documents to be relied on by the claimant are admissible or not is an issue more appropriately determined as part of case management to arrange a final hearing (it is anticipated that this claim will be combined with the other 10 claims). While there was reference to some of the documents of concern to the respondents during today's hearing, they did not form part of the Tribunal's deliberations and a separate hearing in

advance of the final hearing should be arranged to allow parties the opportunity to make submissions on this point in relation to the claim as amended and if part of the combined claims.

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**Employment Judge:  
Date of Judgment:  
Date sent to parties:**

**F Eccles  
14 February 2022  
15 February 2022**

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