



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4110531/2021

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Preliminary Hearing (Glasgow) held via Audio on 7 December 2021

Employment Judge: R McPherson

10 Mr L Ramos

Claimant
In person

15 Lady Coco Ltd t/a
Shamela's Fresh Hot and Cold Food

Respondent
Represented by
T McGrade
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

- (1) Having heard all parties representatives, in the case management Preliminary Hearing, and having issued oral decision in light of parties' competing submissions, the Tribunal **grants** the respondents' opposed application for a Deposit Order to be made, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, requiring the claimant to pay a deposit as a condition of continuing to advance his argument in respect of s 13 Equality Act 2010 (Direct Sex Discrimination) in his claim against the respondent.
- (2) Further, taking into account the information provided by the claimant to the Judge, at this Preliminary Hearing, about his ability to pay a deposit, if ordered by the Tribunal, the Tribunal **orders** that, the deposit to be paid by the claimant shall be **£50 (Fifty pounds)** in respect of the claimant's argument in respect of s13 Equality Act 2010 (Direct Sex Disability Discrimination).
- (3) A Deposit Order, requiring the claimant to pay a deposit of **£50 (Fifty pounds)**, is issued under separate cover, to be paid by the claimant to

HMCTS Finance Centre, Bristol, by **Thursday 30 December 2021**, in terms of the Deposit Order signed by the Judge, and issued with guidance notes, along with this Judgment.

REASONS

5 Summary

1. The claimant appeared via audio at this case management Preliminary Hearing. The respondent was represented by T McGrade Solicitor. The hearing took place via audio as previously directed.
2. This Preliminary Hearing, commencing at 10 am by telephone was notified to parties on Friday 12 November 2021. Previous case management Preliminary Hearings had taken place on Tuesday 28 September 2021 and Tuesday 2 November 2021 with Notes issued to the parties thereafter each hearing.
3. In accordance with Rules 53 and 56 there being no application for Strike Out, the Tribunal determined that it was open to the Tribunal to consider
 - a. the respondent's application for Deposit Order intimated Tuesday 30 November 2021 and in respect of which the claimant had issued his response on Monday 6 December 2021 and indeed emailed the Tribunal shortly prior to this Hearing; and
 - b. the claimant's application for Deposit Order against the respondent, previously raised in telephone case management hearing on 2 November 2021.for Deposit Order for up to £1,000 under Rule 39 of the 2013 Rules for each party to continue with the proceedings, on the ground that the claims had little prospects of success.
4. The Tribunal had intimated to parties on Wednesday 1 December 2021 that the claimant request of 30 November had been referred to an Employment Judge who had directed that the Tribunal confirm that the respondents request for information and for a Deposit Order will be considered at this

case management hearing and parties should be prepared to discuss these matters at that hearing.

5. No witness evidence was adduced, although documents provided to the Tribunal including the claimant's responses provided on Thursday 19 November 2021, following request for extension to Orders granted by the Tribunal at case management hearing on Tuesday 28 September 2021 and Tuesday 2 November 2021 were referred to for their content, including the ET1 and the history of ET3, and a history of the claim was referred to. In addition, documentation provided by the claimant including up to shortly prior to the commencement of this hearing was also considered including documents in zip files (at 9.40 am on the day of this hearing the Tribunal received email zip file from the claimant, however beyond an extract of the EAT website the claimant confirmed that it contained documents which had previously been provided).
6. From discussion at conclusion of the hearing I confirmed that I would issue written judgment setting out detail of the matters considered in the Tribunal's broad discretion of the Applications Deposit Orders. This judgment sets those matters out.

Matters considered for Deposit Order.

7. The claimant presented his ET1 on **Wednesday 28 July 2021** against following ACAS Early Conciliation (ACAS certificate, identifying receipt of EC notification **Friday 11 June 2021** and issue of the ACAS Certificate on **Tuesday 29 June 2021**).
8. ET3 was subsequently lodged.
9. Notes following case management Preliminary Hearing on Tuesday 28 September 2021 (the September 2021 Note) and the case management Preliminary Hearing on Tuesday 2 November 2021 (the November 2021 Note) are referred to for their terms.
10. It is not considered necessary to repeat the September 2021 Note and the November 2021 Note beyond noting that the core of the claimant's claim is

that he seeks to argue that he was dissuaded from applying for a job which the respondent advertised at the takeaway in Ruchill in Glasgow. The claimant points to the job, without offering to explain any genuine occupational requirement describing that it was for "*female staff*". The respondent, who does not give notice in the response of any genuine occupational requirement

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11. Subsequent to the November 2021 case management hearing, the claimant requested an extension (on Tuesday 16 November 2021) primarily in order that he could provide his responses to the Orders identified in the September 2021 Note.

12. The claimant provided his responses to the Orders on Friday 19 November 2021.

13. The respondent, in light of the claimant responses, made a request for a further Order for Responses and Deposit Order on Tuesday 30 November 2021.

14. The claimant provided further comment including ZIP folder on Wednesday 1 December 2021

15. The claimant provided his response submission in response to the respondents request for Deposit Orders on Monday 6 December 2021. The claimant also set out that he renewed his application for Deposit Order against the respondent.

Parties position today.

16. The respondent argues that the claimant's initial evidential burden in such a discrimination claim is upon the claimant, it being argued that the claim is brought simply as a device to secure compensation and that the claimant had not intention of applying for the respondent post. Further the respondent argues claimant's responses on 19 November 2021 do not support the claimant's position, including in respect that the claimant confirms that he lived when making the application in London and confirms continues to do so, the claimant accepts that he did not apply for the post, he did not take

any steps to make any further inquiries, and the claimant has indicated that he has made no applications for employment since 1 May 2021.

- 5 17. Further the respondent, points to having provided (with its email of 30 November 2021) a copy of a public judgment from the Employment Tribunal in Southampton on Friday 4 December 2020 notes that the claimant in that case had the same surname and initial as the claimant, in which an award was made under s13 of the Equality Act 2010. The respondent notes that the claimant, at today's hearing declines to confirm whether he was the claimant in that case, the claimant arguing that to do so may result in him being victimised.
- 10 18. I note that the claimant in support of his position at point 9 of his Monday 6 December 2021 response describes that he was interested in the position "*only for two of the following reasons*" referring a cost-of-living comparison table and the advert referencing that the role was near the beautiful area of Ruchill Park. I further note that the documentation provided by the claimant does not identify the claimant having secured or having applied for equivalent roles equivalent to that advertised in any part of the UK.
- 15 19. I understand the claimant to argue both from his position today and from his response that absent any pled genuine occupational requirement, the evidential burden transfers to the respondent. With respect to the claimant's position, I do not agree and consider that it appropriate to take matters sequentially where there are applications for Deposit Orders from both parties. That is to say, I consider that in the exercise of my discretion it is appropriate to initially consider the evidential burden against the party bringing the claim. While correctly the claimant points to the absence of a
- 20 pled Genuine Occupational Requirement, it is not accepted that that this of itself shifts the burden to the respondent. In particular, the claimant, correctly in my view, does not seek to argue that he is entitled to compensation in the Tribunal by the simple occasion of an advertisement, rather he seeks to
- 25 argue that he is entitled to compensation because he was dissuaded from applying for that job. That is the core of his claim. The respondent argues that he was not dissuaded as he had no real intention of applying.
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20. The claimant argues that he is entitled to rely upon the ECJ decision in **Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV (C-54/07)** [2008] I.C.R. 1390 (**Centrum**) but that existing EAT guidance **Keane v Investigo** [2009] EAT/038909 (**Investigo**) and **Berry v Recruitment Revolution** [2010] EAT/0191010 (**Berry**) are not persuasive and ought to be distinguished on their facts and in respect that neither considered the application of the Equality Act 2010. Further he argues that while he is entitled to rely upon the ECJ decision **Centrum**, the subsequent ECJ decision of **Kratzer v R+V Allgemeine Versicherung AG** 2016 ICR 967 (**Kratzer**) requires to be distinguished including in respect that in **Kratzer** the individual had applied, for the role unlike the claimant. In so far as is relevant for the exercise of my discretion on the initial evidential burden I do not agree with the claimant.

21. **I consider that it is helpful to set out the terms of Rule 39**

39 Deposit orders

(1) *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.*

(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.*

(3) *The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*

(4) *If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the*

consequences shall be as if no response had been presented, as set out in rule 21.

5 (5) *If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

(a) *the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

10 (b) *the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*

otherwise the deposit shall be refunded.

15 (6) *If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

22. **I further consider that it is helpful to set out the terms of Rule 76**

20 **76 *When*** (an expenses in Scotland; costs in England & Wales) ***order or a preparation time order may or shall be made***

(1) *A Tribunal may make a (expenses) order or a preparation time order, and shall consider whether to do so, where it considers that—*

25 (a) *a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

(b) *any claim or response had no reasonable prospect of success.*

Deposit Order
General Discussion

77 I do not consider it necessary to set out the parties' respective positions at length rather, I refer to parties respective positions in this Note where I consider relevant to the exercise of my discretion.

5 78 For the present purposes in terms of **Rule 37** of the 2013 Rules, where the party against whom Strike Out is being considered has been given a reasonable opportunity to make representations either in writing or at a hearing, the Tribunal may **Strike Out** all or any part of a claim on the basis that it has no reasonable prospect of success. The respondent is clear that no application for Strike Out is made.

10 79 For the present purposes in terms of **Rule 39** of the 2013 Rules, where the Tribunal considers that any *specific* argument in a claim has little reasonable prospect of success, the Tribunal may make a **Deposit Order** requiring a party ("*the paying party*") to pay a deposit **not exceeding £1,000** as a condition of continuing to advance that argument.

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20 80 I considered that there is in essence one argument for the claimant arising from the present claim. The claimant at this hearing clarified in response to reasonable inquiries made of him that he had limited saving and while describes that he is now both a student and from time to time a self-employed international market researcher I note that the claimant considers that he would be able to pay a Deposit Order of £50.00, as I understand from his savings without fully depleting same that is indeed the appropriate level for a Deposit Order.

25 81 A deposit order may be made if a Tribunal the specific allegation or argument has little reasonable prospect of success. I referred both parties to the recent EAT decision of **Hemdan v Ishmail** [2017] IRLR 228 (**Hemdan**) in which Simler J, described (para 10) the purpose of a deposit order '*is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails*'

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(para 10), and (para 11) that (at the purpose '*is emphatically not to make it difficult to access justice or to effect a strike out through the back door*'

5 **82** While no Strike Out application is made, I consider that it is appropriate to contrast Strike Out with the present Deposit Order application. As Lady Smith described in **Balls v Downham Market High Street and College** 2011 IRLR 217 (**Balls**) at para 6, for Strike Out "*there must be no reasonable prospects*". Mr. Recorder Bower QC's judgment in **HM Prison Service v Dolby** [2003] IRLR 694 (**Dolby**) (paragraph 14) describes Deposit Order is the "**yellow card**" option, Strike Out being the "**red card**."

10 **83** As above **Rule 39 (1)** of the **2013 Rules** set out that, where at a preliminary hearing the Tribunal considers that any specific argument has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation. However, I indicated that Rule 39(2) of the 2013 Rules provides that the Tribunal shall make reasonable enquiries into the party's ability to pay and have regard to any such information. The information available to me indicates that the claimant's ability to pay is limited.

15 **84** On the information provided, and while the ET1 was silent on any current employment, the claimant confirmed he has been a student since May 2021 while also maintaining some work as what he describes as a self-employed international market researcher and as above, he has intimated that he would be able to pay a restricted Deposit Order of £50. While the purpose of a deposit order is to identify at an early stage claims with little prospect of success it should not, I consider, operate to restrict disproportionately the fair rights of the paying or impede access to justice and in these circumstances, I consider that a Deposit Order against the claimant in the sum of **£50** is an appropriate exercise of my discretion.

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5 85 The claimant further seeks a Deposit Order against the respondent, he had previously raised the matter at the November 2021 case management hearing and as set out at para 13 it was refused at that time. I understand the claimant's position he essentially seeks to repeat his application and considers that absent the respondent pleading a genuine occupational requirement for the job it cannot be said that the respondent's position has reasonable prospect of success. However ultimately it is for the claimant to discharge the initial evidential burden at the core of his argument that he was dissuaded from applying for the specific job. There is nothing before me which suggests that there has been any change to the argument since his application for a Deposit Order was refused. Further as set out above on the information the claimant has elected to provide, including noting the absence of any indication that he has secured or applied for any roles, comparable or otherwise, in any part of the UK including where he lives in London in 10 2021 beyond that sole post, in the exercise of my discretion I consider that the claimant has little reasonable prospect of success.

15 86 As set out above that the claimant's application for a Deposit Order has already been refused. I am not persuaded that this is matter which requires to be revisited. Further I do not consider that it can be said that 20 the respondent has little reasonable prospect of success in its argument that the claimant was not dissuaded from applying for the role despite the absence of a pled genuine occupational requirement that the advertised role required its staff to be female. While the claimant additionally refers to s24 (1) (g) of the Companies Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 and argues, as I understand it that the advertisement was in breach of those regulations which is said to be criminal offence, 25 that is not a matter which the Tribunal has jurisdiction on, and I do not consider that the assertion removes the primary evidential burden in the present claim on the claimant. The claimant request for a Deposit Order is refused. 30

5 **87** It is noted that where a Deposit Order has been ordered, if at any stage following the making of such an order, the Tribunal decides against the paying party (the claimant in this case) in relation to that specific argument for substantially the same reasons as those it relied on when making the Deposit Order, the claimant would be treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of **Rule 76** of the 2013 Rules *unless the contrary is shown* in terms of **Rule 39 (5) (a)** of the 2013 Rules. This means that the Tribunal would be required to *consider* whether it was appropriate and proportionate to make an Expense Order or preparation time order (PTO) against that party under **Rule 76(1)**.

Conclusion

15 **88** Unless the claimant pays the relevant deposits as directed above, the s13 EA argument to which the Deposit Order relates will be struck out by the Tribunal.

89 If he seeks to have the Deposit Order varied, suspended, or set aside by the Tribunal, then he must make a written application to the Tribunal, with cc to the respondent's representative, as soon as possible, and before the time limit for payment expires.

20 **90** If the claimant decides not to proceed with the s13 EA 2010 argument, his representative should give written notification to the Tribunal, with copy to the respondent's representative.

91 If any deposit is paid as directed above, the claimant's s13 EA 2010 argument (the argument relied upon) will proceed to the 1-day CVP full panel final hearing and as further directed.

30 Employment Judge: Rory McPherson
Date of Judgment: 09 December 2021
Entered in register: 13 December 2021
and copied to parties