



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102915/2022**

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**Held in Chambers on 18 August 2022**

**Employment Judge M Robison**

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**Mr D Powell**

**Claimant  
In Person**

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**Advocate General for Scotland  
Representing the MOD**

**First Respondent  
Represented by:  
Mr A Gibson -  
Solicitor**

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**Advocate General for Scotland  
Representing the Cabinet Office**

**Second Respondent  
Represented by:  
Mr A Gibson -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the employment tribunal is that the claim against the second respondent is struck out under rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 on the grounds that it has no reasonable prospect of success.

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**REASONS**

1. At a case management preliminary hearing which took place on 26 July 2022, the second respondent made an application in terms of Rule 37(1)(a) of the Employment Tribunal Procedure Rules 2013 to have the claim struck out on the grounds that it has no reasonable prospect of success.

2. In the ET3, the second respondent stated that “It is entirely unclear as to why the claimant has raised a claim against the second respondent. The second respondent is not the claimant’s employer. The second respondent has no involvement in these matters whatsoever. The second respondent is not in control of or involved in the implementation of the first respondent’s diversity and inclusion strategy. Matters of this nature are delegated to individual departments. There is no prospect of success of a claim against the second respondent. Even with the limited specification of the claimant’s claims it is clear that nothing said by him points to any liability on the part of the second respondent. The claimant should withdraw his claim against the second respondent, failing which the tribunal should strike them out as having no reasonable prospects of success”.
3. When this matter was discussed at the preliminary hearing for case management, the claimant confirmed that he was not prepared to withdraw his claim. Accordingly the second respondent’s application had to be adjudicated on by the employment tribunal. It was agreed that this matter could be dealt with by way of written submissions. The claimant set out his position in submissions dated 31 July 2022 and the second respondent responded with submissions on 9 August 2022.

#### 20 **The claimant’s written submissions**

4. The claimant argues that the second respondent is a valid respondent and should remain as a respondent for the following reasons:
1. The cabinet office is the corporate headquarters of the civil service and has oversight across government departments. Central government departments, including MOD, must seek cabinet office approval to spend in certain areas, including learning and development, which incorporates diversity and equality training, literature and courses. The claimant alleges these amount to harassment, encourage discrimination and are in contravention of the public sector equality duty. MOD is not distinct from cabinet office in regard to these areas about which the claimant complains, so the cabinet office should be held up as equally answerable;

2. Findings against the MOD would be binding on the rest of the civil service;
3. Relying on Coombes v DVSA he argued that a claimant does not necessarily have to be employed directly to bring proceedings against a second respondent if the findings against the MOD would amount to findings against the entire civil service;
4. Relying on Kalaf v Cabinet Office and HMRC, he argued that this demonstrates that proceedings can be brought against two government departments simultaneously because decisions made in one area are binding across all civil service areas;
5. Relying on Wagener v HMRS and HM Treasury, where the claimant was not employed by the second respondent, which had overall responsibility for the government's public sector pay policy, in this case similarly the cabinet office controls the spending of central government departments for learning and development; and
6. Since the cabinet office is the corporate headquarters of the civil service, it cannot be within the spirit of the law or fairness and justice to render a corporate HQ unanswerable for the goings on within departments which have been approved; or fairly placed above the reach of employment law and beyond all responsibility.

#### **The respondents -written submissions**

5. In written submissions, the second respondent argued that the claimant's claims meet the high test of no reasonable prospects of success because the claimant makes no allegations of the second respondent acting in a discriminatory matter towards the claimant. Even if the Tribunal was to make findings in fact entirely in line with the claimant's pleadings there would be no findings in fact made against the second respondent that it did any act about which the claimant complains. In particular, the claimant makes no claim that the second respondent has acted in a discriminatory manner towards him. The claimant's pleadings make no allegation that the second respondent did any act at all towards him. The claimant's entire premise for including the second

respondent as a respondent is that he disagrees with the civil service policies and procedures. Relying on A v B and C (reported at 2011 ICR D9), the second respondent argued that the prospects of the claimant establishing a connection between any alleged less favourable treatment, unfavourable treatment or unwanted conduct and the second respondent is "utterly fanciful". The claimant says in his submissions that external diversity and inclusion training, literature and courses form some of the substance of his complaint since he alleges that they amount to harassment. While the second respondent does not accept that the claimant does actually set this out within his pleadings, even if he did and there was a finding made by the Tribunal that issuing him with literature at training courses he was required to attend amounted to harassment, that would have been the actions of the first respondent.

6. The Government Skills and Curriculum Unit, part of the second respondent, do not mandate any training for the first respondent. Whilst the second respondent produces training materials, manages the content of the training and monitors spending on training, it is for the first respondent to decide which of that training is provided to their employees.

7. The second respondent argues that the case of Coombes v DVSA and the Cabinet Office is not of assistance. The second respondent is not arguing that there will never by any circumstances where they would be a valid respondent despite not being the claimant's employer. The question is fact sensitive. The second respondent argues that the facts of this case are very different. The question whether the claimant was discriminated against by being disciplined by the first respondent has nothing whatsoever to do with the second respondent. Requiring him to attend training was entirely the act of the first respondent. It is only the first respondent's actions towards him which the claimant can validly argue were a discriminatory act done towards him.

8. The claimant is entirely wrong to say that findings made against the MOD would amount to findings against the whole civil service because the complaints about materials are not complaints of acts done towards him; simply disagreeing with the content of policies does not form the basis for a discrimination claim; and even if the tribunal were to find that the issuing of the

final written warning was a discriminatory act, that would not amount to a finding against the second respondent.

9. In both Khalaf and Wagener, the application for strike out was successful.
10. The fact that the second respondent controls spending on learning and development is irrelevant because controlling spending is not having overall responsibility and in any event does not make them liable for any discriminatory acts done by the first respondent.

#### **Deliberations and decision of the Tribunal**

11. The claimant in this case seeks to pursue claims against both the MOD and the Cabinet Office. The second respondent seeks strike out on the grounds that the claim has no reasonable prospects of success.
12. I accept that the test in relation to the question of no reasonable prospect of success is a high hurdle, and it would be particularly unusual to strike out a discrimination claim, especially if the facts were in dispute. It is for that reason that, when considering this question, claims are usually taken "at their highest" that is even if the claimant proves every fact he seeks to prove as set out in his claim form, then still the claim would not succeed. That is the approach I have taken here, that is to assume that the claimant can successfully prove all that he seeks to prove.
13. The claimant relies on the Equality Act 2010 to found jurisdiction of the Tribunal in this case against the second respondent.
14. The claimant must have a statable claim against the second respondent under the Equality Act. In order to do so the claimant will require to identify a relevant protected; potential prohibited conduct; and to establish that any alleged discrimination comes within the areas which are covered by the Equality Act.
15. However the claimant seeks to rely on general unfairness when he argues that the second respondent is a valid respondent. He has strong views on the content and implementation of diversity and inclusion policies throughout the civil service. The claimant sets these out over 17 pages in his ET1. However, at no point in this narrative does he make reference to any potential

discriminatory act done to him as an individual by the second respondent. He makes no attempt to specify a provision of the Equality Act which might mean that the second respondent is potentially liable for discrimination (prohibited conduct) against him.

- 5 16. The decisions which the claimant seeks to rely on are all decisions of the Employment Tribunal which are not binding on this Tribunal but in any event the second respondent has distinguished them from the current claim. While I accept that there may well be circumstances when a claim may validly be taken against a second respondent (for example as an agent or to aid a contravention of the act) in respect of alleged discrimination which the claimant has suffered, no claim is made to that effect in the claimant's written case, or in his written submissions.
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17. While I appreciate that the claimant is a party litigant, it is not however apparent that there are any provisions which the claimant could rely on which might result in the second respondent being liable. Put shortly, no-where in the claimant's written case (pleadings) does he set out any potential act of discrimination covered by the Equality Act for which the second respondent is potentially liable.
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18. In this case there is no question however of striking out the whole claim. The claim will proceed against the first respondent and the claimant will have an opportunity to present his argument to the Tribunal. To that extent, there is no prejudice to the claimant in striking out the second respondent.
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19. It may well be that there are alternative routes through which the claimant can challenge the actions of the Cabinet Office, specifically in regard to any claim that there has been a breach of the public sector equality duty. This Tribunal does not however have jurisdiction to consider any alleged breach of that duty.
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20. The claim against the second respondent is therefore struck out on the grounds that as plead the claim has no reasonable prospects of success.

21. The claim will proceed against the first respondent to the case management preliminary hearing which has been listed for 12 September 2022 at 2 pm.

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**Employment Judge: M Robison**  
**Date of Judgment: 18 August 2022**  
**Entered in register: 23 August 2022**  
**and copied to parties**

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