



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107686/2021

**Held on 14 and 15 June 2021
(By Video Conference, CVP)**

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**Employment Judge R Gall
Tribunal Member P McColl
Tribunal Member D Frew**

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Mr J Owusu

**Claimant
In Person**

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Dundee City Council

**Respondents
Represented by:
Ms M Morrissey –
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Unanimous Judgment of the Tribunal is that the claim of victimisation brought in terms of Section 27 of the Equality Act 2010 is unsuccessful.
2. As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the hearing. It is provided for the convenience of parties.

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REASONS

1. This claim was heard on 14 June 2021. The claimant appeared on his own behalf and gave evidence. Ms Morrissey represented the respondents. Evidence for the respondents was given by Ms Ridley. She had been
5 supervisor of the provider of the reference, Ms Adamson, and had “double checked” the reference and agreed to it being sent in the terms in which it was given. Ms Ridley participated by telephone. Both parties agreed to her evidence being taken by that means in circumstances where obtaining a connection enabling her to be seen as well as heard proved impossible. A
10 joint file of documents was submitted. There was no evidence about loss and in those circumstances it was agreed that this hearing would determine liability alone with a further hearing taking place in the event of success for Mr Owusu.
2. Given that evidence was heard yesterday, the Tribunal does not propose
15 to rehearse the facts. There was, in any event, little dispute about the facts.
3. The claim made is that the terms of a reference given by the respondents to a prospective new employer of the claimant constituted a detriment. Mr Owusu said that he had been subjected to the detriment because of a
20 protected act. That protected act was the bringing by him of an earlier claim of discrimination against the respondents. That claim was unsuccessful after a hearing. It was a matter of agreement that the bringing of that claim was a protected act.
4. The respondents said that they had provided a reference in terms which
25 would have been the same if there had been no protected act, or if the employee involved had been someone other than Mr Owusu, who had been dismissed, but who had not presented an earlier Tribunal claim.
5. In considering a claim of this type, previous cases confirm that an
Employment Tribunal has to consider the evidence and to come to a view as to what it regards, on the evidence it hears, as being the real reason,
30 the core reason or the motive of the employer in doing the act in question.
6. The burden of proof provisions of the Equality Act 2010 apply.

7. When asked for a reference, the respondents had not simply given the dates when Mr Owusu had been employed by them, together with details of the role he had. The Tribunal heard no evidence, however, of there being a policy to reply to reference requests with only those basic details.
5 Indeed the evidence was that there was no such policy.
8. Some parts of the reference form sent for completion by the respondents were not fully answered by them. When asked for their views on Mr Owusu's skills, abilities and experience for the post, they stated that he was employed in a similar role by them. They might potentially have been
10 able to be fuller in their reply as they had appraisal records for Mr Owusu. Those who had been his line managers during employment with the respondents had retired, however. The last appraisal they had was around a year before he had been dismissed by the respondents. The respondents did not therefore regard themselves as being in a position to
15 provide a fuller answer to the question asked. They did not explain that they were of the view that they could not comment due to line managers no longer being in their employment.
9. The Tribunal could see why this answer was a source of frustration for Mr Owusu when he read the reference. It led him to the view that there
20 was no balance in the reference.
10. The fundamental issue which Mr Owusu had with the reply to the reference related to the answer given by the respondents to a question which asked whether he had been subject of any management action. The question went on to ask that "*full details including dates, the nature of the (alleged)*
25 *offence, poor performance or poor attendance and the outcome, where applicable*", were provided.
11. The reply from the respondents was that "*Mr Owusu was dismissed following investigation into a number of allegations of misconduct which were substantiated at a disciplinary hearing and deemed to have caused
30 an irretrievable breakdown in the working relationship.*"
12. Mr Owusu said that this was a malicious reference. It was a subjective opinion. The respondents referred to the dismissal letter which stated that all but one of the allegations were substantiated, and confirmed that the

allegations were viewed as extremely serious, with one being viewed as constituting gross misconduct. The dismissal letter went on to say “*I believe your conduct has caused upset and alarm amongst team members and has resulted in the breakdown of trust and confidence required by the Council.*” The reference fairly reflected that position, the respondents said.

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13. Mr Owusu said that the respondents had not answered the question in the reference request, in that they had not provided full details as asked. The respondents maintained that they had been factual and accurate in the terms of the answer they had given.

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14. Mr Owusu also said that the respondents had said they would not provide him with details of the allegations, whilst being prepared to give those details to his prospective new employers, had they asked. This was not a position adopted by Mr Owusu in his evidence, being an argument which became apparent only through cross examination. It was difficult, in fact, to read the correspondence on this point in the way advanced by Mr Owusu, in the view of the Tribunal. Mr Owusu had sought information as to why full details had not been given by the respondents in answering the question in the reference request. He himself knew, however, what the allegations were having been at the disciplinary hearing, having received the dismissal letter and having been through the case before the Employment Tribunal by the time this correspondence happened. He had not therefore asked the respondents what the allegations were only to be denied that information.

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15. The Employment Tribunal considered the evidence very carefully. It had the benefit of being able to discuss the evidence and applicable law at conclusion of the evidence on 14 June and again in the morning of 15 June.

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16. It had a degree of sympathy for Mr Owusu. The respondents had not provided a complete response to the question asked as to management action. Whether that was helpful or unhelpful to Mr Owusu is a moot point. The Tribunal had to ask itself what, on the evidence, was the real reason or motive for the respondents doing as they did. Was it to a substantial degree (meaning to more than a trivial extent) due to the protected act?

17. The Employment Tribunal unanimously came to the view that there was no basis on what it heard in evidence, and from the documents about which evidence was given, on which it could conclude that discrimination by way of victimisation had occurred.
- 5 18. The answer given, whilst not providing full details and not quoting exactly from the dismissal letter, did reflect the reasons given for dismissal in that letter. Those were conduct and a breakdown in trust and confidence. That latter element led to the part of the reply to the reference request which referred to there being “*an irretrievable breakdown in the working*
10 *relationship*”. That was not a subjective opinion being given. It was not so worded because of the protected act. There was no evidence from which the Employment Tribunal could conclude that the reference, given by Ms Adamson and approved in its terms by Ms Ridley, was completed as it was because Mr Owusu had brought a previous Employment Tribunal
15 claim.
19. Similarly, the absence of a fuller explanation, or of information in relation to Mr Owusu’s performance in his role with the respondents, was not because of the protected act in the view of the Tribunal. It was also not something from which an inference of discrimination could properly be
20 drawn.
20. In making this assessment the Employment Tribunal kept in mind that Ms Adamson was aware of the events which led to the dismissal of Mr Owusu. She had been an HR adviser, but had not been the decision maker at any stage. She was also aware of the claim which Mr Owusu had
25 previously made to the Tribunal. Ms Ridley had approved the reference as mentioned. There was no evidence before the Tribunal of any motive on their part to impede or cause harm to Mr Owusu or his job prospects. There was nothing which the Tribunal regarded as providing any basis from which any such inference could be drawn.
- 30 21. In reaching its decision the Tribunal looked at the individual elements which Mr Owusu argued should lead the Tribunal to find in his favour and also to any cumulative effect which it might be considered existed. After having regard both to the individual elements and to the possibility of

cumulative effect, it concluded that there was no force in Mr Owusu's position that discriminatory conduct by way of victimisation had occurred in the giving of the reference.

5 22. The Tribunal understood Mr Owusu's concern, also his continuing view that the initial decision to dismiss him was wrong and his view that the previous Employment Tribunal decision in 2014 was also wrong. The decision to dismiss him and the matters dealt with in the previous case were not matters before this Tribunal.

10 23. This Tribunal had to decide if the terms of the reference were as they were because of Mr Owusu having brought that earlier claim to the Employment Tribunal. The Tribunal was clear in its unanimous view that, on the evidence it heard, the claim was unsuccessful. Whether the reference was a detriment, whether its terms had caused the job offer to be retracted, what the position might have been had full details been supplied by the
15 respondents and what loss flowed from these events are matters therefore which do not require to be addressed.

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

Robert Gall
15 June 2021
16 June 2021