



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4109668/2021

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Open Preliminary Hearing (Dundee) held via CVP on 8 September 2021

Employment Judge: R McPherson

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Mr. Alastair Majury

**Claimant
R Russell
Solicitor**

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The Capital Markets Company Ltd

**Respondent
Represented by
R Campbell
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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(1) Having heard both parties representatives, in Open Preliminary Hearing, and having issued oral decision, in light of parties' competing submissions, request being made for reasons, 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 specific arguments in respect of s 19 Equality Act 2010 (indirect disability discrimination) in his claim against the respondents.

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(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 **£10 (ten pounds)** in respect of the claimant's argument in respect of s19 Equality Act 2021 (Indirect Disability Discrimination).

- (3) A Deposit Order, requiring the claimant to pay a deposit of **£10 (Ten pounds)**, is issued under separate cover, to be paid by the claimant to HMCTS Finance Centre, Bristol, by **Wednesday 6 October 2021**, in terms of the Deposit Order signed by the Judge, and issued with guidance notes, along with this Judgment.

REASONS

Summary

1. The claimant was represented by Mr. Russell Solicitor. The respondents were represented by Mr. Campbell Counsel. The hearing took place via CVP as previously directed.
2. This Preliminary Hearing was appointed to determine the respondent's applications; for Strike Out under Rule 37 of the ET Rules of Procedure 2013 (the 2013 Rules) for strike out on the ground that it was asserted that the claims had no reasonable prospect of success; or for Deposit Order for £1,000 under Rule 39 of the 2013 Rules for the claimant to continue with the proceedings, on the ground that the claims had little prospects of success.
3. The respondent provided a File of documents together with a list of authorities to which I was referred. Both parties referred to a bundle of authorities provided by the respondent containing **Jansen Van Rensburg v Kingston upon Thames** [2007] UKEAT/0096/07, **Wright v Nipponkoa Insurance (Europe) Ltd** [2014] UKEAT/0113/14 and **H v Ismail** [2016] UKEAT 0021/16. Reference was also made to **HM Prison Service v Dolby** 2013 IRLR 694 (**Dolby**) and **Tree v South East Coastal Ambulance** UKEAT/043/17 (**Tree**). The issue of Strike Out Having been withdrawn, no specific authorities on the former application were referred to, although I have set out some comment for this extended Note.
4. No witness evidence was adduced, although documents contained in the File were referred to for their content, including the ET1 and ET3, and a history of the claim was referred to.

5. In the morning of **Tuesday 7 September 2021**, the respondent intimated by email to the Tribunal, and the claimant's representative, that it would no longer pursue the Strike Out Application but that it would continue to pursue the Deposit Order under Rule 39 of the 2013 Rules.
- 5 6. From discussion at conclusion at today's hearing, having issued oral judgment as set out above, the claimant requested that detail of the matters considered in the Tribunal's broad discretion of the Deposit Order were set out. This judgment sets those matters out.
- Matters considered for Deposit Order.**
- 10 7. The claimant presented his ET1 on **Wednesday 19 May 2021** against the respondent company following ACAS Early Conciliation (ACAS certificate, identifying receipt of EC notification on **Wednesday 24 February 2021** and issue of the ACAS Certificate on **Friday 5 March 2021**). ACAS EC commencing when the respondent notified withdrawal of job offer
- 15 8. The respondent resists the claims, setting out their position in ET3.
9. It is not in dispute that the claimant applied for a Financial Service role with the respondent [which both claimant and respondent describe as "*a global technology and management consultancy*"] and attended interviews on **Friday 29 January 2021**.
- 20 10. As part of the application process, the claimant completed a case study on **Tuesday 2 February 2021**.
11. On either **Thursday 4** or **Friday 5 February 2021**, the claimant attended a final interview and was made a verbal offer on **Friday 5 February 2021**, followed on **Monday 8 February 2021** with written confirmation accepted by
- 25 the claimant.
12. On **Tuesday 9 February 2021**, the respondent issued what (in the ET3) they refer to as the **Offer Letter**, which set out that the offer was conditional upon receipt of satisfactory references, including background vetting and

confirmation of the claimant's right to work in the UK. That was available in the file for this hearing.

13. Parties agree that on **Wednesday 11 February 2021**, the claimant returned the Offer Letter signed.

5 14. The claimant was also provided with a written contract of employment dated **Tuesday 9 February 2021** and describes a 12-month period of employment commencing on Monday 8 March 2021. I do not consider it necessary to set out the full terms of clause 3 of that written contract I was referred to. In summary, it appears to describe the respondent reserving the right to
10 conduct background checks as part of a conditional offer and describes the respondent reserving the right to terminate employment summarily. That document was available within the File today.

15. It is a matter of agreement that the claimant signed that written contract on **Thursday 11 February 2021**.

15 16. The respondent letter of Tuesday 9 February 2021 also appears to provide what it describes as a **voluntary Diversity and Inclusion Monitoring form**.

17. The claimant was further provided with a document **New Employee Details Form**. After the section in which the claimant entered some financial details, there is a section headed **Diversity and Inclusion**. This section sets out that
20 the respondent would "*request voluntary data relating to any pre-existing Disabilities*." It describes how the respondent says the information will be used and concludes, "*if you feel comfortable to provide it, then it will help us with you...*". It is a matter of agreement that the claimant ticked the box indicating that he considered himself to have a disability, out of three options;
25 the second being no and the third being "*prefer not to say*." The form then says if yes; please state the type of impairment and gives 5 options; sensory impairment, mobility impairment, speech impairment, mental health impairment, prefer not to say and other (please confirm). The claimant ticked speech impairment and mental health impairment. The date this form was
30 completed is not apparent. However, the claimant refers to it along with returning the contractual documentation on **Thursday 11 February 2021**.

18. The claimant (at para 11 of the paper apart of the ET1) describes that between **Friday 12 February** and **Monday 22 February 2021**, the respondent carried out checks, and on **Tuesday 23 February 2021**, the respondent referred to media check, which the claimant describes was not previously mentioned. The claimant describes that the offer was withdrawn on **Tuesday 23 February 2021** (and this was confirmed in writing on **Wednesday 24 February 2021**). The claimant set out, in his ET1, that from **Tuesday 23 February 2021**, he sent emails to address alleged concerns and sent evidence the false reports were made about him, and no finding of wrongdoing was ever made, and further sent what are described as clear PVG, BPSS, and UKSC clearances.
19. What was said to be an email chain on **Tuesday 23 February 2021**, was provided in the File. That commences with a reference to background checks and describes a “*discrepancy in media check*” and requests “*further explanation regarding the points which have been raised.*” It then appears to provide information; the claimant having indicated he was not aware of points raised. The claimant appears to respond that they “*were and remain false press reports,*” describing that they were investigated by two organisations he volunteered with, and they were deemed false. In further email describes that he was able to provide someone to vouch for him. It appears that he describes that he had worked in Financial Services organisations since 2017, there had been no issue with “*onboarding,*” that he had both, what are described as, BPSS security clearance and UK Security Clearance, and he was in discussion with the ICO to have the information removed from search engine results.
20. A further email which bears to be from the claimant **Wednesday 24 February 2021**, broadly repeats the claimant’s position. It concludes by asserting that there must be another reason for the offer to be withdrawn, possibly due to protected characteristics.
21. The respondent in the ET3 describes that it wrote to the claimant on **Wednesday 24 February 2021**, confirming the withdrawal of the offer,

explaining that background checks were not completed to its satisfaction and denying that the withdrawal was because of protected characteristic.

22. On **Wednesday 24 February 2021**, ACAS early conciliation was initiated with certificate issued **Friday 5 March 2021**.

5 23. On **Wednesday 19 May 2021**, the claimant's representative presented the ET1. It sets out at para 15 of the paper apart, that he "*believes that the real reason for the withdrawal of the offer of employment was following the disclosure of his disabilities.*" The claimant describes that he was provided with an offer of employment, describes proximity of the withdrawal to his
10 disclosure of asserted disability, and argues "*the Claimant can demonstrate that the Respondent's reasons for the withdrawal of the of the offer... were neither genuine nor justified*" and states the real reason was a change of heart on learning of the claimant's asserted disability. The claimant at para 10 describes that he was "*asked to complete a "New Employees Details Form" and describes a section headed up "Disability"*."
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24. The ET3 was subsequently submitted. The claim is resisted. The respondent argues that the reason for withdrawal of job offer was unrelated to any disability, the respondent not accepting that the claimant has a qualifying disability, arguing that the withdrawal was in consequence of what are
20 described as media checks which identified what I understand to be social media comments, the characterisation of which I understand not be in dispute. The respondent further argues that the disclosure of disability was a voluntary process.

25. On **Monday 12 July 2021**, the respondent made the application that a
25 Preliminary Hearing is appointed; the claim be struck out on the ground that it had no reasonable prospect of success, in the alternative if the Tribunal was not minded to strike the claim out that a Deposit of £1,000 be ordered for the claimant to continue as it was said that the claim has little reasonable prospect of success.

30 26. On **Monday 19 July 2021**, a case management Preliminary Hearing took place, and that confirmed that Preliminary Hearing was appointed

Wednesday 8 September 2021 to determine the respondent application for strike out and/or deposit order of £1,000 in order to continue with the proceedings on the grounds that the claim has little prospect of success. The Note was issued **Tuesday 20 July 2021**.

5 27. As above, in the morning of **Tuesday 7 September 2021**, the respondent's representative intimated by email to the Tribunal and the claimant's representative that it would no longer pursue the Strike Out Application but that it would continue to pursue the Deposit Order under Rule 39 of the 2013 Rules.

10 **Parties position today.**

28. The respondent argues that the claimant's initial evidential burden in such a discrimination claim is upon the claimant and that the contemporaneous documentation does not support the claimant's position.

15 29. I understand the respondent to be arguing; in essence, from the available documentation is not clear on what basis this claimant can establish a difference in treatment. Further, the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal '*could conclude*' that, on the balance of probabilities, the respondent had committed
20 an unlawful act of discrimination.

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

Deposit orders

25 **39. (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.*

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(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.*

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(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) *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—*

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(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

(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.

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(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.*

Deposit Order

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Discussion and Decision

31. I do not consider it necessary to set out the parties' respective submissions in detail; rather, I refer to their positions in this Note where I consider relevant to the exercise of my discretion.

32. 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 an order requiring a party (*“the paying party”*) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that argument.
33. While there may be said to be one allegation (the withdrawal of the job), I considered that there were a number of arguments arising from that one allegation.
34. **Disability is in dispute.** Whether the claimant qualifies under s6 EA 2010 is a matter of argument.
35. The respondent raised a matter regarding, what is said to be, noncompliance with the Order of Tribunal sent to parties **Tuesday 20 July 2021**, to the effect that no medical evidence has yet been provided. The order (no 2) sets out that no later than **Tuesday “3 August 2021** *the claimant will provide the respondent with disability impact statement and any other evidence on which he relies in support of this claim that at the relevant time (February 2021) he was disabled in terms of section 6 of the Equality Act 2010”*. I note that no application has been made to vary that order. A **Disability Impact Statement** (the DIS) was available today. On its face, the DIS sets out the claimant's position that he has anxiety and depression and refers to his attendance for treatment and medication. The respondent continues to reserve their position on the question of disability status (s6 EA 2010) on the basis that the relevant supporting medical documentation has not yet been provided. The DIS, on the face it, gives notice of the detail of the claimant's argument that he has a qualifying condition. I understand that the claimant's agents aim to provide the medical evidence relied upon (which I presume will be the relevant copy GP records), but I accept that during the pandemic, there have been delays.
36. In all the circumstances, I do not consider it appropriate to consider the Deposit Order (Strike Out application having been withdrawn) to address this matter. I have concluded that it would be appropriate to vary Order No 2 to

extend the period for compliance to **Wednesday 3 November 2021**, being 7 days in advance of the next, now scheduled, case management Preliminary on **Wednesday 10 November 2021**.

37. Beyond the question of qualifying disability status, the claimant asserts **two arguments; s 13 EA 2010 Direct Disability Discrimination** and by way of esto **s19 EA 210 Indirect Disability Discrimination**.
38. As I understand it, the claimant argues that it is a common position by a respondent to seek strike out failing which deposit order, essentially as a litigation tactic. I do not consider it necessary to express a view beyond considering the present claim and note that this application was not contained within the original ET3 but a subsequent application to the Tribunal. There is nothing before to suggest the application was not directed to the present claim. The request for the matter to be considered has been granted, and this hearing has been appointed.
39. Further, the claimant argues that, as the matter was initially listed for a hearing on Strike Out failing which a Deposit Order, I should conclude from the respondent's decision to withdraw the Strike Out Application that the respondent accepts that the claim has some merit.
40. I have considered the withdrawal of the Strike Out application. Rule 37(1)(a) of the 2013 Rules provides that a claim may be struck out on the ground that it has **no** reasonable prospect of success. Striking out a claim is a draconian measure that should only be taken in the clearest cases.
41. Strike Out may be appropriate, as described in **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 (**Ezsias**), where the facts sought to be established are inexplicably inconsistent with undisputed contemporaneous documentation. However, while there is no rule that discrimination cases cannot be struck out, where the basis of the application to strike out is not one of jurisdiction, limitation, or another clear point of law, extreme hesitation would require to be exercised in doing so and may indeed be an error of law to pre-empt the determination of a full hearing [**Anyanwu v South Bank Student Union** [2001] ICR 391 (**Anyanwu**) para 24 and 37]. As Lady Smith

described in **Balls v Downham Market High Street and College** 2011 IRLR 217 (**Balls**) at para 6, “*there must be no reasonable prospects.*”

42. Although not provided with a copy of the authority for the claimant, I was referred to **Dolby** and the use of the “**yellow card**” option. That is a reference to paragraph 14 of Mr. Recorder Bower QC’s judgment in **Dolby**, in which Deposit Order is the “**yellow card**” option, Strike Out being the “**red card**.”

43. The respondent, shortly in advance of this hearing, withdrew their application for strike out. They, however, continued to insist upon their application for Deposit Order. I do not accept that in withdrawing an existing application for Strike Out (particularly in a discrimination claim given the extreme hesitation which would be required), that party makes any relevant concession on the test which requires to be applied to an existing application for Deposit Order.

44. Further, both Strike Out, and Deposit Order applications were intimated as set out above. The respondent expressly stated it wished to insist upon the application for Deposit Order for this hearing.

45. The respondent application, as intimated on **Monday 12 July 2021** and as set out in the Tribunal Note issued **Tuesday 20 July 2021**, has the effect, inviting the Tribunal to make a deposit order of £500 for each of the arguments (being s13 Direct and s19 Indirect both EA 2010), rather than £1,000 for each argument. Mr. Campbell did not suggest otherwise.

46. I considered that I require to consider each of these arguments separately.

S13 EA 2010 EA 2010 Direct Disability Discrimination

47. The claimant’s **s13 EA 2010 Direct Disability Discrimination** argument is set out as the primary argument (s19 Indirect is expressly stated as being on an esto basis).

48. While I note the criticism of s15 of the paper apart, it does give notice that the claimant says he will “*demonstrate that the respondent’s reasons*” for withdrawal of the offer “*were neither genuine nor justified*” and argues that

the real reason was due to the respondent having a change of heart upon learning of the (what is said to be) the claimant's disability. The respondent's position is that the documentation does not support the claimant's position. On the face of it, I consider that the documentation indicates that the claimant has little prospect of success in this argument. The documentation on which the claimant relies appears to be expressed as a voluntary request for broad classifications of disability in each request gives an express option not to respond. It is not clear why, given what would appear to be concurrent information on which the respondent says it acts, could not be the respondent's actual reason for the withdrawal. While the claimant seems to argue that he could prove that the information the respondent asserts it relies upon was inaccurate, it is not clear why the respondent ought to have accepted the claimant's position. That is, in essence, as I understand the respondent's argument for this hearing and satisfies me that the claimant has little prospect of success in the s 13 EA claim.

49. Further, ET1 does not identify that the claimant relies upon any comparator. The essence of the s13 EA 2010 argument is to consider whether a respondent treated a claimant less favourably than it treated or would have treated others (comparators), in not materially different circumstances. The respondent is entitled to fair notice of what comparators the claimant relies upon; they may be actual specific individuals or hypothetical comparators. It being for the Tribunal to consider if the alleged treatment was because of the claimant's (as asserted here) disability and/or because of the protected characteristic relied upon. I consider that in the absence of any offer to identify any comparator (including hypothetical), the claimant has little prospect of success in this argument.

50. I understand it to be argued that the issue of there being no comparator was not previously canvassed. The respondent's application, as intimated on **Monday 12 July 2021**, does not detail criticism. Para 8 and 9 of the Tribunal's note summarises that despite the claimant assertion (at para 15 of ET1), there was no detail as to what (if anything) the claimant was offering to prove that the respondent's reasons for the withdrawal were neither

genuine nor justified and the specification had not been provided. There has been no adjustment to the ET1 after that. It is for the claimant to give fair notice of the claimant's argument.

51. **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. On the basis that the claimant has not set out that he is offering to prove his s13 Direct Disability Discrimination argument by reference to any comparator, I advised that I was minded making a Deposit Order. 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.

52. On the information provided, and while the ET1 was silent on any current employment, it was confirmed that the claimant is presently employed (although that employment is understood not to have precluded the claimant applications). However, his monthly expenditure, which is said to include significant monthly debt repayment is said to be substantial, and it is indicated that he relies on a family member for financial support.

53. While the purpose of a deposit order is to identify at an early stage claims with little prospect of success it should not, in my view, operate to restrict disproportionately the fair rights of the paying or impede access to justice. In all the circumstances, I consider that any actual Deposit Order in relation to the claimant's s13 Direct Disability Discrimination argument may operate to restrict disproportionately the fair rights of the paying and impede access to justice. In the circumstances, I decline to make any Deposit Order in relation to s13 EA 2010.

s19 EA 2010 argument

54. On the available information, I consider that the **s19 EA 2010** argument, which is pled as "*esto*," readily meets the test of having little reasonable

prospect of success. The PCP relied upon is a “*refusal to employ people who have disabilities such as those disclosed by the Claimant. The criterion for the respondent is that any applicants do not have underlying health conditions.*”. The request for information issued after the offer of employment, which the claimant relies upon, on the available information was voluntary. The conditions themselves are only generally described. The requests, on the face of it, expressly provide an option of non-provision of information. There is nothing pled which indicates any evidential foundation for a general operating policy or criteria or practice applied by the respondent (which I note is described by both parties as a global technology and management consultancy) of refusing to employ people who have disabilities such as the broad disabilities which the claimant elected to provide information on. By contrast, the respondent offers to demonstrate a non-discriminatory reason for withdrawal of the job offer, which, again on the face of it, is consistent with the available documentation.

55. While there is a factual dispute as to the reason for the withdrawal, the available documentation does not indicate that any requirement for any disability information was made during the initial interview process. On the face of it, the documentation set out that only a voluntary request for information is made. The respondent offers to prove that for reasons unrelated, the offer was withdrawn. While not achieving the level required for strike out (**Ezsias**), the contemporaneous documentation readily meets the test for a Deposit Order here.

56. In relation to the s19 EA 2010 argument, I am required to 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.

57. Again, the purpose of a deposit order is to identify claims with little prospect of success at an early stage. It should not operate to disproportionately restrict the fair rights of the paying or impede access to justice. In all the circumstances, I consider that a nominal deposit order is appropriate in relation to the s19 EA 2010 argument of £10 payable as directed above.

Conclusion

58. Unless the claimant pays the relevant deposits as directed above, the s19 EA argument to which the Deposit Orders relate will be struck out by the Tribunal.

5 59. If he seeks to have the Deposit Order varied, suspended, or set aside by the Tribunal, then his representative 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.

10 60. If the claimant decides not to proceed with the s19 EA 2010 argument, his representative should give written notification to the Tribunal, with to the respondent's representatives.

61. If any deposit is paid as directed above, his s19 EA 2010 argument will proceed to the next case management Preliminary Hearing and as further directed.

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Employment Judge:

R McPherson

Date of Judgment:

13 September 2021

Date Sent to Parties:

13 September 2021

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