



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4108030/2021

Hearing on Deposit by CVP on 31 January 2022

Employment Judge: M Sutherland (sitting alone)

10 **Santosh Chima**

Claimant
Represented by:
Ms J Merchant, Solicitor

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Tayside Health Board

Respondent
Represented by:
Ms H Craik, Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment is that a deposit order shall be issued requiring the following deposits to be paid as a condition of proceeding with the following complaints –

- A deposit of £250 in respect of the complaint of direct discrimination
- A deposit of £250 in respect of the complaint of victimisation
- A deposit of £250 in respect of the complaint of harassment

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REASONS

Introduction

- 5 1. A Preliminary Hearing was held to determine the Respondent's application for deposits in respect of the complaints of direct discrimination, victimisation and harassment.
2. Neither party gave or called any witness to give oral testimony but some documentary evidence was provided. Both parties gave written and oral
10 submissions.

Background

1. The Claimant continues to be employed by the Respondent as the Head of Corporate Equalities. She has made complaints of direct race discrimination,
15 harassment, and victimisation. She asserts that the fact and manner of her suspension and investigation by the Respondent amounts to less favourable treatment because of her race, or unwanted conduct related to her race, or victimisation because of a protected act. The Claimant relies upon her racial group of being a Sikh of Indian origin and a Chamar. She relies upon the
20 protected act of lodging a prior discrimination claim. The Respondent accepts her protected characteristic and her protected act but her complaints are otherwise resisted by the Respondent who assert that a white Manager who is a direct report of the Claimant was treated the same way in respect of the same third party allegations of bullying and harassment.
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2. A Case Management Preliminary Hearing was held on 5 May 2021 at which the Claimant was ordered to provide further particulars of her complaints. The Claimant provided further and better particulars on 1 and 14 June 2021 ('FBPs'). The Claimant advised that she was relying upon a hypothetical
30 comparator whom she described as a white Head of Corporate Equalities. She asserted: "To the best of the Claimant's knowledge, information and belief there are about 100 Heads of Service within the Respondent's organisation and no white Heads of Service have ever been suspended from work and then investigated in similar such circumstances. To the best of the Claimant's

knowledge, information and belief the Claimant is the only person of an ethnic minority background in a Head of Service role within the Respondent's organisation." She further asserted that: "The such similar circumstances relied upon are: whereby the Claimant was suspended in relation to an anonymous letter which did not name her; where the Respondent carried out an "open surgery" to substantiate the anonymous letter; where a small minority of staff attended, some of whom were supportive of the Claimant and others who raised issues the Claimant had already dealt. Whereby the Claimant is then suspended from duty, with a raft of procedural failings as set out in the ET 1, is given no specification or evidence of what it is alleged she has done wrong until around 6 months after the date of suspension and whereby she is still awaiting an outcome of the investigation over a year later".

3. On 7 December 2021 the Respondent made an application for deposit in respect of all of complaints on the basis that they have little reasonable prospects of success because the Claimant has not set out a basis on which it could be inferred that either her race or the protected act was the reason for or related to her treatment. The Respondent provided further particulars asserting that a white Head of Service has been suspended and investigated in similar circumstances (allegations of sexual harassment) and produced a redacted letter of suspension in support.
4. The application for a deposit was opposed by the Claimant.
3. On 14 December 2021 the Claimant made an application for documentation and information as to how other workers were treated in similar situations. Determination of the application was to be held over pending determination of the application for a deposit. In that application the Claimant advised that the differential treatment of others in similar circumstances was within her knowledge but that this documentation, etc was sought by way of evidence. The Claimant's application describes comparators in similar but not the same circumstances including a white Head of Service who was not suspended or investigated in respect of third party allegation of bullying and harassment; and managers who were not suspended or investigated in respect of their failure to deal with third party allegations of bullying and harassment.

4. The Claimant remains in the employment of the Respondent on a net monthly salary of £2750. She has monthly outgoings of £1700. She did not advise of any savings.

The Law

5 Race Discrimination

5. Under Section 13 of the Equality Act 2010, direct race discrimination occurs where the Respondent treats the Claimant less favourably than it treats or would treat others because of race.
6. A difference in race and a difference in treatment of the Claimant and of a comparator in the same circumstances is not sufficient. There must also be a basis upon which it could be inferred that the reason for difference in their treatment was because of race (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337* and *Madarassy v Nomura International Plc [2007] IRLR 246*). The Claimant must therefore offer to prove that she suffered less favourable treatment than a comparator in the same circumstances; and must offer to prove facts which could indicate that she was treated less favourably because of her racial group.
7. Under Section 26 of the Equality Act 2010, harassment occurs where the Respondent engages in unwanted conduct related to a racial group which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The unwanted conduct must be associated or connected with the racial group. The Claimant must offer to prove the unwanted conduct, and the purpose or effect; and must also offer to prove facts which from which it could be inferred that the unwanted conduct related to her racial group. "Related to" under Section 26 has a wider meaning than "because of" under Section 13. Where the unwanted conduct is not on the face of it related to a racial group, evidence that the Claimant is being treated differently from other employees may provide a basis upon which it could be inferred that the unwanted conduct was related to her racial group.

Victimisation

8. Under Section 27 of the Equality Act 2010 victimisation occurs when the Respondent subjects the Claimant to a detriment because the Claimant has done a protected act including bringing proceedings under the Act.

Deposit Order

- 5 9. Under Rule 39(1) of the Employment Tribunal Rules of Procedure, where the tribunal considers that any specific allegation or argument in a claim has little reasonable prospects of success, it may order the Claimant to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.
- 10 10. Whilst this is a lower hurdle than having no reasonable prospects of success (under Rule 37 on strike out), there must be a reasonable basis upon which to doubt that the legal arguments are valid or that the material facts necessary to support the allegation will be established.
11. Even if there are little reasonable prospects of success, the Tribunal retains a
15 discretion whether to make an order for a deposit having regard to the overriding objective to deal with cases fairly and justly. Relevant factors may include whether it will avoid delay (and save time), whether it will avoid expense (and save costs), and the importance of the issues.
12. Under Rule 39(2), when deciding the amount of each deposit, the tribunal must
20 make reasonable enquiries into the Claimant's ability to pay the deposit and have regard to such information when deciding the amount of the deposit. Where multiple allegations or arguments are advanced (as is the case here) there may be multiple deposits ordered not exceeding £1000 each. However the tribunal should stand back and consider whether the total sum awarded is
25 proportionate (*Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14, EAT*).
13. The purpose of a deposit order is to identify weak claims, to flag that weakness to a party, and to warn of a risk of expenses (costs) if they proceed. Its purpose is not to achieve strike out indirectly by ordering a deposit that cannot
30 reasonably be complied with (*Hemdan v Ishmail [2017] IRLR 228, EAT*).
14. Under Rule 39(4), if a deposit is ordered and the Claimant fails to pay the deposit, the specific allegation or argument will be struck out.

15. Under Rule 39(5), if a deposit is ordered and paid, the deposit shall be refunded to the Claimant unless tribunal ultimately decide to rejects the specific allegation or argument for substantially the same reasons. In these circumstances the Claimant may treated as having acted unreasonably when
5 considering an award of expenses (costs) and further, the deposit shall be paid to the Respondent.

Respondent's Submissions

5. The Respondent's submissions were in summary as follows –

- 10 a. "little reasonable prospect of success" is a less draconian measure than strike out and a tribunal has greater leeway (*Van Rensburg v Royal Borough of Kingston-Upon-Thames and others UKEAT/0096/07; UKEAT/0095/07*)
- 15 b. the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim but is not restricted to considering purely legal questions and may refer beyond the pleadings to documentary evidence (*Wright*).
- 20 c. There is no blanket ban on strike out (and therefore deposit) of discrimination claims including where on the case as pleaded there is really no more than an assertion of difference of treatment and a difference of protected characteristic which are not, without something more, sufficient material on which to infer discrimination (*Chandhok v Tirkey [2015] ICR 527*).
- 25 d. The Claimant narrates no link either between the alleged detriment and the protected act or her race. She pleads no fact which would suggest the protected act or race was the reason for or related to her treatment. There is no "something more". The Claimant has provided no facts from which the Tribunal could infer discrimination or victimisation.
- 30 e. One of her managers who is white was suspended and investigated at the same time for the same concerns namely third party allegations of bullying and harassment. The tribunal is entitled to take account of a clear and non-discriminatory explanation of her treatment (*Wright*)
- f. £1000 is not the overall maximum (*Wright*)
- g. The Claimant continues to be suspended on full pay.

- h. A Tribunal hearing would result in significant cost and management time for the Respondent, and the Tribunal service

Claimant's Submissions

- 6. The Claimant's submissions were in summary as follows –
 - 5 a. The Respondent failed without reason to follow its own policies regarding her suspension (including its templates)
 - b. There are around 100 white heads of service, she is the only one from an ethnic minority background, and no other Head of Service has been treated this way.
 - 10 c. The Claimant must request the information from the Respondent required to establish a prima facie case (*Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18 19, in the Court of Appeal*)
 - d. The manager who is a direct report is not a suitable comparator because she is not in the same circumstances as the Claimant who is a Head of
15 Service without prior complaints
 - e. the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to their claim (*Wright*).
 - f. If there is core factual conflict, a mini-trial of the facts is to be avoided and instead this should be properly resolved at a full merits hearing where
20 evidence can be heard and tested (*Hemdan*). This applies to the issue of whether the direct report is a comparator in the same circumstances.
 - g. Under Section 136 of the Equality Act the Claimant bears the initial burden of proving facts from which the tribunal could conclude, in the absence of any other explanation, that the Respondent had committed an unlawful act
25 of discrimination against her. If that is satisfied, the Respondent must prove, on the balance of probabilities, that the treatment was in no sense whatsoever done because of the relevant protected characteristic (*Igen v Wong [2005] IRLR 258*).
 - h. It is further accepted that the initial burden is more than simply showing a
30 difference in treatment and a protected characteristic but not very much may need to be added (*Veolia Environmental Services UK v Gumbs (UKEAT 0487/12/BA)*).

- i. the facts set out by the Claimant are sufficient to constitute a prima facie case of discrimination. The Claimant is the only Head of Service to have been suspended and investigated in the manner in which she was.
- 5 j. The Claimant has knowledge of a Head of Service (and other managers) who were not suspended or investigated in similar circumstances. The only difference is her race and prior tribunal claim.
- k. The Claimant acknowledges a Head of Service was suspended for allegations of sexual harassment but, unlike her, was provided with a clear allegation and notification of who made the allegation, and was suspended
10 in person at a meeting at which they were accompanied.
- l. the fact that the Claimant still has not received an outcome to the investigation calls into question it's legitimacy and supports the inference it was because of her race and/or prior tribunal claim
- m. The Claimant has provided sufficient evidence in support of her prima facie
15 case

Discussion and decision

- 7. The issues to be determined are: whether any allegations have little
20 reasonable prospect of success; if so, whether a deposit should be ordered; and if so, in what amount, having regard to the Claimant's ability to pay.
- 8. The Claimant articulates in her Claim and FBPs unfavourable treatment regarding the fact and manner of her suspension and investigation in breach of the Respondent's policy and procedure. The Claimant asserts in her Claim
25 and FBPs that she was treated in this way because of her race and/ or prior tribunal claim and that a hypothetical comparator who was white, or who had not brought a prior Claim, would not have been treated in this way. The Claimant further asserts that this treatment amounted to harassment because it was unwanted conduct related to her race which had the relevant purpose
30 or effect.
- 9. Taking her complaints of direct discrimination and victimisation as articulated in her Claim and FBPs at their highest, the fact that the Claimant is the only ethnic minority Head of Service, and the only Head of Service to be treated in this way, does not provide a basis upon which it could reasonably be inferred

that she was treated in this way because of her race or prior tribunal claim (and therefore was treated less favourably than a hypothetical comparator). The Claimant has not therefore articulated a prima facie complaint of direct discrimination or victimisation.

5 10. Taking her complaint of harassment as articulated at its highest, the treatment is not on the face of it related to her race, and the Tribunal is therefore again dependent upon the same considerations regarding the drawing inferences. The Claimant has not therefore articulated a prima facie complaint of harassment.

10 11. In the absence of an actual comparator in materially the same circumstances, the tribunal will necessarily have to draw inferences from surrounding circumstances including considering the treatment of individuals in similar albeit not the same circumstances.

12. Looking beyond the pleadings, the Claimant's application for disclosure of information and documents describes comparators in similar but not the same circumstances including a white Head of Service who was not suspended or investigated in respect of third party allegation of bullying and harassment; and two managers who were not suspended or investigated in respect of their failure to deal with third party allegations of bullying and harassment. In submissions the Claimant asserted that the managers were white and had not made a prior tribunal complaint.

13. The Respondent provided further particulars asserting that a white Head of Service had been suspended and investigated in similar but not the same circumstances (regarding allegations of sexual harassment) and produced a redacted letter of suspension in support. The Claimant does not dispute the fact of their suspension and investigation but instead seeks to rely upon the difference in the manner of that suspension.

14. The Respondent asserts in their Response that her direct report was treated in the same manner as the Claimant in respect of the same allegations of bullying and harassment. The Claimant asserts that their circumstances are not the same because her direct report is not a Head of Service and because part of the allegations against the Claimant are about how she dealt with the allegations against her direct report.

15. It was not disputed by the Claimant that her manager who was white was treated in the same way in respect of the same third party allegations but she asserts that there were differences in their circumstances. It is also assumed for the purposes of this application that the Claimant will be able to prove that some managers who are white were not suspended in respect of their failure to deal with third party allegations of bullying and harassment. Furthermore it was not disputed by the Claimant that a white Head of Service was previously suspended and investigated for allegations of sexual harassment but she asserts that there were differences in their circumstances and in the manner of their suspension. It is also assumed for the purposes of this application that the Claimant will be able to prove that a white Head of Service was not suspended or investigated in respect of third party allegations of bullying and harassment but that there were differences in their circumstances (hence why they were not chosen by the Claimant as a real comparator). Taking all of this into account a tribunal could not reasonably infer from these circumstances that her treatment was because of her race or a prior tribunal claim.
16. Accordingly, having regard both to the complaints as articulated and separately the further facts as asserted, there is therefore a reasonable basis upon which to conclude that her complaints have little reasonable prospects of success.
17. The purpose of a deposit order is to identify weak Claims, to flag that weakness to a party, and to warn of a risk of expenses (costs) if the party elects to proceed. If, in the face of that warning, the Claimant elects not to proceed with these complaints her claim in its entirety would not proceed and the 3 day final hearing would be discharged. If the Claimant elects not to proceed, consideration should be given to withdrawal but not dismissal given her continued employment and the continuing nature of the dispute. If the Claimant elects to proceed significant costs will be incurred in preparing for and attending the final hearing. In these circumstances, and having regard to the overriding objective of dealing with cases fairly and justly, it is considered appropriate to exercise discretion in favour of the making of an order for a deposit in respect of each of the complaints.
18. Having made reasonable enquiries into the Claimant's ability to pay and having regard to that information, it is considered that the Claimant could reasonably

afford to pay deposits which total less than £1000 (being the difference between her monthly net earnings and outgoings).

- 5 19. Accordingly it is considered appropriate to order payment of a deposit in sum of £250 in respect of each complaint (being for direct discrimination, victimisation and harassment).

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Employment Judge:	M Sutherland
Date of Judgment:	04 February 2022
Date Sent To Parties:	07 February 2022