



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4102607/2022

Held in Glasgow on 28 April 2023

Employment Judge P O'Donnell

10 **Mr Abdelhameed Elatabani**

**Claimant
In Person
[via Interpreter:
Mr Nasr]**

15 **Adecco UK Limited**

**First Respondent
Represented by:
Mr R Hayes -
Solicitor**

20 **Amazon UK Services Ltd**

**Second Respondent
Represented by:
Mr P Livingston -
Counsel [Instructed
by Taylor Wessing]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Employment Tribunal is that:

1. The Second Respondent's application under Rule 37 for strike-out of the claim against them is refused.
2. The Second Respondent's application under Rule 39 for a deposit order is refused.
- 30 3. The Tribunal grants the First Respondent's application for a deposit order under Rule 39 in respect of the allegation of age discrimination that the Claimant was not retained in employment by the First Respondent at the end of his assignment in circumstances where a younger worker was or would have been retained. The Claimant is ordered to pay a deposit of £100 in
35 order to continue to advance this allegation.

4. The Tribunal grants the First Respondent's application for a deposit order under Rule 39 in respect of the allegation of breach of contract that the Claimant has not been paid the sum of £240 he says he is owed in respect of sick pay. The Claimant is ordered to pay a deposit of £100 in order to
5 continue to advance this allegation.
5. The Tribunal grants the First Respondent's application for a deposit order under Rule 39 in respect of the allegation that the Claimant has been underpaid holiday pay. The Claimant is ordered to pay a deposit of £100 in order to continue to advance this allegation.
- 10 6. The Tribunal grants the First Respondent's application for a deposit order under Rule 39 in respect of the allegation that the Claimant is entitled to damages for breach of contract in respect of notice. The Claimant is ordered to pay a deposit of £100 in order to continue to advance this allegation.

REASONS

15 Introduction

1. The Claimant has brought various complaints against both Respondents which are resisted. The primary complaint against both Respondents is one of direct age discrimination under the Equality Act 2010. There are also monetary claims against the Second Respondent; a claim of deduction of
20 wages in respect of holiday pay; claims of breach of contract in respect of two matters, a claim for sick pay due for a period when the Claimant was absent due to covid/self-isolation and a claim in respect of notice.
2. The case has a long procedural history which includes applications to amend to add additional claims, the identification of the respondents against whom
25 the claims are made and further particularisation of the claims in order that fair notice is given.
3. The present hearing was listed to determine applications made by each Respondents; the First Respondent (R1) has made an application under Rule 39 for a deposit order in respect of the various allegations made against them;
30 the Second Respondent (R2) has made an application under Rule 37 for the

claim against it to be struck out (failing which for a deposit order under Rule 39).

4. There was a bundle produced for the hearing; this predominantly consisted of the Tribunal correspondence such as ET1, ET3s, notes of case management hearings, previous judgments, further particulars from parties etc. There was, however, some documents which would be considered to be evidence but there was limited reference to these. Any pages numbers in this judgment are a reference to page numbers in the bundle.
5. There was an interpreter present at the hearing to interpret for the Claimant and the Tribunal would like to record its thanks to the interpreter for his assistance on the day.

Postponement application

6. At the outset of the hearing, the Claimant made an oral application for postponement of the hearing. No application had been made in advance.
7. The Claimant is of Sudanese national origin and still has close family in the country. He has been concerned about the armed conflict which had recently begun in Sudan and worried for the safety of his family. As a result, he felt that he had not been able to prepare for the hearing. He also made reference to the fact that he was not legally represented and that there were a lot of documents to go through to ensure no evidence was missed.
8. Whilst being sympathetic to the Claimant's circumstances, the application was opposed by both Respondents on the grounds everyone was present and a postponement would simply delay matters. It was suggested that, given that the hearing had been listed for a whole day and that the agents for both Respondents estimated that it would only take 15-30 minutes to deal with each application, there was time in the day to allow the Claimant to review the written submissions that had been produced and the bundle in order to prepare his response.
9. The Tribunal did not immediately grant or refuse the application. Instead, it took the suggestion made by the Respondents' agents and allowed the

Claimant 90 minutes to review the documents and attempt to prepare a response. At that point, the Claimant could renew his application if he still felt that he was unprepared.

5 10. The Claimant was permitted the assistance of the interpreter during this time under the direction that the interpreter should only be translating the documents (within the scope of his oath which had been administered by this point) and not offering any advice or opinion on what is being said by the Respondents.

10 11. When the hearing resumed, the Claimant confirmed that he was in a position to proceed.

Relevant Law

12. The Tribunal has power to strike-out the whole or part of claim under Rule 37:
At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or
15 *response on any of the following grounds—*

- (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has*
20 *been scandalous, unreasonable or vexatious;*
- (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) *that it has not been actively pursued;*
- (e) *that the Tribunal considers that it is no longer possible to have a fair*
25 *hearing in respect of the claim or response (or the part to be struck out).*

13. The process for striking-out under Rule 37 involves a two stage test (*HM Prison Service v Dolby [2003] IRLR 694, EAT; Hasan v Tesco Stores Ltd*

5 *UKEAT/0098/16*). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied.

14. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

10 15. Similarly, In *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

15 16. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

17. The Tribunal has the power to make a deposit order under Rule 39:

20 (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.*

25 (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.*

30 (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*
- 10 *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.*
- (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*
- 15 *favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*
18. In *Hemdan v Ishmail* [2017] IRLR 228, it was confirmed that the purpose of the rule was to identify claims with little prospect of success at an early stage
- 20 and discourage those but was not intended to act as a barrier to access to justice or to “*strike-out by the back door*”.
19. In determining an application for a deposit order, the Tribunal is entitled to have regard to the prospects of any party making out any factual assertion on which the claim is based as well as purely legal issues (*Van Rensburg v Royal*
- 25 *Borough of Kingston-upon-Thames UKEAT/0095/07*). However, the Tribunal “*must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response*” (*Van Rensburg* para 27) although this should not involve a trial of the facts as this would defeat the purpose of the Rule (*Hemdan*).

Decision – Second Respondent’s application

20. It was agreed that R2’s application would be heard first and the Tribunal has adopted the same sequence in this judgment.
21. Mr Livingston produced written submissions which he adopted and developed with additional oral submissions. He began by setting out the relevant Rules and caselaw. These are uncontroversial and so, for the sake of brevity, the Tribunal does not repeat them here.
22. He submitted that the only remaining claim against R2 was one of age discrimination and set out the basis of that claim as it was understood by R2 in terms of the alleged less favourable treatment and the comparators relied on by the Claimant.
23. Turning to the central submission in respect of both strike-out and deposit order, this can, in effect, be summarised as an argument that the Claimant in his ET1 (and subsequent Further Particulars) has not set out the “something more” that is required in terms of whether any less favourable treatment is on the grounds of a protected characteristic as set out in *Madarassy v Nomura International [2007] IRLR 246*. In particular, it was submitted that the Claimant has not put forward any basis on which he suggests that any alleged less favourable treatment was on the grounds of age and that the Claimant’s case is no more than assertion of difference in treatment and difference in age.
24. The Claimant’s response to the submissions on behalf of R2 was not wholly addressed to the particular legal issues to be resolved in determining the application. This is not a criticism of the Claimant who is a party litigant dealing with complex legal issues. He did submit that no reason was given for why his assignment had been ended by R2 and that the Respondent did not mention certain aspects of the case.
25. The Tribunal reminds itself of the draconian nature of the power to strike out a claim and that it should be slow to exercise such a power where there is a party litigant and a fact sensitive claim such as the present claim of

discrimination (*Mbusia* and *Anyanwu*). Further, the Tribunal should not be conducting a “mini-trial” of the facts in exercising its powers under Rules 37 and 39.

5 26. The Tribunal also bears in mind the guidance from the higher courts that it is rare to find direct evidence of discrimination with it often being unconscious on the part of an employer. In these circumstances, the Tribunal requires to consider what secondary inferences it can draw from its findings of primary fact. In particular, the Tribunal is conscious of the guidance given in in *Igen v Wong [2005] ICR 931* (as approved by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870*). In particular, the authorities are clear that the “something more” is a relatively low bar for a claimant to overcome.

15 27. Much of R2’s criticism of the Claimant’s case was focussed on what he has pled in his ET1 and subsequent particulars. However, the purpose of these are not to plead evidence but to give fair notice of the case R2 has to meet. The fact that the Claimant has not set out every piece of evidence which may be heard by a Tribunal at the final hearing does not mean that his case has no or little reasonable prospect of success. Those prospects will depend on the evidence heard by the Tribunal, the findings of fact it makes from that evidence and the inferences it draws from those findings of fact.

20 28. Further, the Tribunal does not consider that the Claimant’s pled case can be characterised as being no more than “difference in treatment and difference in age”. The ET1 and subsequent further particulars set out more of a narrative than that. For example, there are issues around the reasons given, at the time, for the Claimant’s assignment being terminated which he disputes and if the Tribunal were to make findings of fact favourable to the Claimant on these issues then these could be the “something more” required by *Madarassy*. Similarly, the Claimant avers facts relating to an opportunity for permanent employment with R2 which was not realised and he asserts that this was without an explanation.

25
30

29. Looking at the case as a whole, the Tribunal does not consider that it can be said that the Claimant's case, taken at its highest, has no or little reasonable prospects of success. In particular, this is a case where the findings of primary fact and the inferences to be drawn from those facts are fundamental.
- 5 The Tribunal bears in mind what is said in the authorities above and in those quoted in the submissions for R2 regarding the need for proper examination and consideration of such matters.
30. For these reasons, R2's applications under Rule 37 is refused as the Tribunal does not consider that it can be said that the Claimant's case has no reasonable prospects of success if it is taken at its highest.. In respect of the
- 10 Rule 39 application, the Tribunal does recognise that this is a lower hurdle for R2 to get over but it does not consider that the threshold has been reached for effectively the reasons set out above.

Decision – First Respondent's application

- 15 31. Mr Hayes also provided written submissions which he supplemented orally. The First Respondent (R1) makes an application for a deposit order in respect of each of the allegations against them and the Tribunal will deal with each of these in turn.
32. First, a deposit order is sought in relation to the allegation of age
- 20 discrimination. In particular, Mr Hayes submitted that the allegation is that R1 did not allow the Claimant to remain in their employment whilst seeking a new assignment for him and that a younger worker would not have been dismissed in the same circumstances.
33. Reference was made to the comparators relied on by the Claimant who are
- 25 the same comparators relied on for the age discrimination claim against R2. It was submitted that these comparators were not in the same circumstances as the Claimant as they had secured direct employment with R2 by the end of their assignment. They, therefore, no longer needed R1 for their continued employment.

34. It was submitted, therefore, that the Claimant's pled case does not even set out a claim that he was being treated less favourably than his named comparators.
35. As with R2's application, the Claimant's response to R1's application was not particularly directed towards the issues in the age discrimination claim. The Tribunal notes that he did not dispute that the comparators had secured direct employment with R2 and so were not in the same or similar circumstances to him in respect of continued employment with R1.
36. The Tribunal considers that the question of the comparators is fundamental to the age discrimination against R1. The allegation is that R1 did not retain the Claimant in their employment when the assignment with R2 was terminated because of his age. The Claimant needs to prove that a younger worker was or would have been retained by R1 in similar circumstances.
37. The difficulty he faces is that the comparators he has identified were not retained by R1 at the end of their assignments with R2 at all because they moved to direct employment with R2. They have not, therefore, been treated more favourably by R1. There are, therefore, little prospects of the Claimant showing that these are actual comparators who were treated more favourably.
38. They also do not provide useful evidence of how a hypothetical comparator would have been treated by R1 at the end of an assignment with R2 (or any other client of R1). There is very little prospect of the Tribunal drawing any useful inferences about how any younger worker would have been treated at the end of an assignment given that they left R1 to take up direct employment with R2.
39. In these circumstances, the Tribunal agrees with R1 that the Claimant has little reasonable prospects of successfully showing that the Claimant was not retained by R1 at the end of his assignment in circumstances where a younger worker was or would have been retained. For these reasons, the Tribunal grants R1's application and makes an Order under Rule 39 for the Claimant to pay a deposit as a condition for advancing this allegation. The amount of the deposit will be addressed below.

40. Second, Mr Hayes addressed the breach of contract claim relating to sick pay. In summary, R1's position is that the sum of £240 sought by the Claimant in respect of an alleged failure to pay him when absent due to covid/self-isolation has been paid, albeit after the present proceedings had been commenced by the Claimant. There is, therefore, little reasonable prospects of success in the Claimant establishing that he has not been paid the sum he says is owed.
41. The Claimant's position on this allegation was less than clear. He accepts that he received a payment of £240 in July 2022 but states that this was "definitely" not a payment of the sum sought in respect of sick pay. However, when the Tribunal asked him what he said this sum represented, he could give no other explanation. In particular, he did not assert that the sum of £240 (which was the same sum as he sought in respect of sick pay) was paid for any reason other than in satisfaction of this debt.
42. In these circumstances, the Tribunal agrees with R1 that the Claimant has little reasonable prospects of successfully showing that he has not been paid the sum of £240 he says he is owed in respect of sick pay. For these reasons, the Tribunal grants R1's application and makes an Order under Rule 39 for the Claimant to pay a deposit as a condition for advancing this allegation. The amount of the deposit will be addressed below.
43. Third, Mr Hayes addressed the claim for holiday pay. He submitted that the Claimant had been paid a total of £305.86 in respect of holiday pay consisting of payments made during the Claimant's employment in respect of bank holidays and a payment in lieu of untaken holidays made at the end of the Claimant's employment. Reference was made to payslips at pp219, 220 and 227 showing the payments.
44. It was submitted that the Claimant does not dispute receiving these payments and has not, at any stage, set out any case that he is owed more than the amount paid by R1 in respect of holiday pay. Reference was made to correspondence by the Claimant in the course of these proceedings at pp112-113 where he states that he was owed £284 based on the Government website calculation but had only been paid £205.86. Mr Hayes submitted

that this ignores the payment recorded in the payslip at p219 and the figure is based only on the payments recorded at pp219 and 227.

45. In response, the Claimant stated that he was not aware of what he was entitled to in respect of holiday pay and he had lost confidence in R1 so was suspicious. He did not deny receiving the three payments which refer to holiday pay.
46. The burden of proving his case lies with the Claimant; it is not for the Tribunal or R1 to make his case for him. In this instance, the Claimant does not even set out a statable case that he has been paid less holiday pay than he was entitled to be paid. He sets out no case at all.
47. The Tribunal does take account of the fact that the Claimant is a party litigant but he has all the facts available to him to be able to calculate his holiday entitlement; this entitlement is clearly set out in his contract; he will be aware of what holidays (including bank holidays) he took during his employment; he is aware of what payments he has received. With this information, a party litigant would be able to carry out the arithmetic exercise required to calculate his pro-rated holiday entitlement.
48. In these circumstances, the Tribunal does consider that the Claimant has little reasonable prospect of succeeding in the allegation that he has been underpaid his holiday pay as he cannot even set out how much he says he is owed. For these reasons, the Tribunal grants R1's application and makes an Order under Rule 39 for the Claimant to pay a deposit as a condition for advancing this allegation. Again, the amount of the deposit will be addressed below.
49. Fourth, and finally, there is the claim for breach of contract in relation to notice pay. Mr Hayes made reference to clause 14 of the Claimant's contract with R1 (p199) which states that he is not entitled to payment for any period of notice during which the Claimant is not working on assignment with a client of R1. He submitted that this is exactly the circumstances in this case and on a plain reading of the contract the Claimant was not entitled to be paid during his notice period.

50. In response, the Claimant sought to argue that the wording relied on by R1 only applied where he had been offered an alternative assignment and had refused it. When the Tribunal pointed out that the wording of the clause does not say that, the Claimant replied that this would mean that the Respondent could dismiss him without notice and not pay anything.
51. The plain reading of the relevant clause of the contract is that advanced by the Respondent and there is no basis on which the clause can be interpreted in the way suggested by the Claimant nor is there any basis on which the Tribunal could read into that clause the words suggested by the Claimant.
52. The purpose of any breach of contract claim is put a claimant in the same position they would have been if the contract had not been breached (that is, if notice had been given). If notice had been given in this case then the Claimant would not have been on assignment and would not have been paid.
53. In these circumstances, the Tribunal does consider that the Claimant has little reasonable prospect of succeeding in the allegation that he is entitled to damages for breach of contract in relation to notice. For these reasons, the Tribunal grants R1's application and makes an Order under Rule 39 for the Claimant to pay a deposit as a condition for advancing this allegation. Again, the amount of the deposit will be addressed below.
54. The Tribunal, having decided to make Orders for deposits as set out above, now turns to the question of the amount of the deposit.
55. The first question in this consideration is whether to order one deposit covering all the allegations or a separate deposit for each allegation.
56. The Tribunal has decided to order a deposit for each allegation. The reasons for this are as follows:
- a. The allegations are entirely separate from each other. The success or failure of one allegation does not mean that any of the others will succeed or fail.

b. The Claimant may wish to reflect on what is said above about the merits of each allegation and decide whether he only wishes to pursue some of these and not others. He can, therefore, pay the deposit only for those allegations he decides have better prospects of success and pursue those whilst allowing the other allegations to fall away.

57. The Tribunal now turns to the question of the amount of each deposit and it has taken into account the following factors:

- a. The Claimant has no savings.
- b. He is paid weekly and can earn between £300-400 a week although it can be less depending on the shifts he is working.
- c. He pays rent of £350 a month, council tax of £140 a month with arrears of £168 a month and gas/electricity bills of £300 a month.
- d. This leaves a disposable income of around £200-600 a month.

58. The Claimant stated that if any deposit order is made then he would not be able to pay it and would withdraw his claims. The Tribunal has noted this but does not consider it is a factor that precludes making the Orders for deposits to be paid. The purpose of deposit orders are to make parties consider the merits of their case and discourage claims with poor prospects.

59. In this case, the Tribunal considers that the sum of £100 would be appropriate for each deposit; this balances the Claimant's limited ability to pay against the need for the deposit order to achieve the purpose for which it is made.

Case Management

60. After hearing parties in respect of the various applications, the Tribunal turned to matters of case management. In particular, it considered that, to avoid further delay, a final hearing should be listed. In the event, that the Tribunal granted some or all of the applications made by the Respondents then the final hearing could be discharged (in the event that all of the claims fell away) or the length of the hearing varied (in the event that any remaining claims could be dealt with in less days).

61. It was agreed by both Respondents that the list of issues at pp184-186 was correct. The Claimant's position was less clear. For example, he raised an issue around his pension which the Tribunal noted had arisen before and the position which had been explained to the Claimant that no such claim had been lodged and would require an application to amend.
62. The Tribunal made a direction that the list of issues for the final hearing would be that at pp 184-186 but that the Claimant would be allowed 7 days to suggest any variation subject to the following caveats:
- a. He must bear in mind that the list is a list of issues for the Tribunal to determine and not an agreement of facts.
 - b. Any suggested variation to the list of issues must be within the scope of the existing claims and any new claim (for example, in respect of his pension) will require a formal application to amend the ET1.
63. If parties cannot agree any suggested variation to the list of issues then this can be referred to the Tribunal for further directions.
64. The Tribunal directed that there should be a joint bundle of documents produced for the final hearing. The agent for R1 agreed to collate this. The Tribunal considers it would assist if both Respondents could prepare a joint list of documents they wish to include in the bundle which can then be shared with the Claimant for him to identify and provide any additional documents he wishes to include.
65. The final copy of the bundle should be available to all parties not later than 28 days before the start of the final hearing and 5 copies lodged with the Tribunal no later than 7 days before the final hearing.
66. A final hearing to be held in person at the Glasgow Tribunal Centre was listed for 10-12 October 2023 before a full Tribunal panel. It was noted that an interpreter would be required for the hearing.

67. A formal Notice of Hearing will follow in due course.

5 **Employment Judge: P O'Donnell**
Date of Judgment: 05 May 2023
Entered in register: 09 May 2023
and copied to parties