



# EMPLOYMENT TRIBUNALS

## PRELIMINARY HEARING

**Claimant:** Mr L Doherty

**Respondent:** St Anne's Community Services

**Heard at:** Leeds **On:** 5 March 2019

**Before:** Employment Judge Licorish (sitting alone)

**Appearances:**

For the claimant: in person

For the respondent: Ms L Gould, Counsel

## RESERVED JUDGMENT

1. The claimant's complaints of direct religion or belief discrimination, indirect religion or belief discrimination, and detriment for having made a protected disclosure are not struck out because they have no reasonable prospect of success.
2. No separate deposit order is made in respect of the complaints of direct religion or belief discrimination, indirect religion or belief discrimination, and detriment for having made a protected disclosure.
3. Subject to the parties' compliance with separate case management orders dated 8 March 2019, the complaints which presently continue are:
  - 3.1 harassment related to religion or belief, sexual orientation and/or disability;
  - 3.2 direct discrimination because of religion or belief;
  - 3.3 indirect religion or belief discrimination;
  - 3.4 detriment for having made a protected disclosure;
  - 3.5 unlawful deductions from wages.

## REASONS

1. The claimant is employed by the respondent registered charity as a support worker. He is based at Sutherland Court in Halifax, which accommodates 7 service users with learning and physical disabilities, but also works overtime shifts elsewhere. By a claim form presented on 12 November 2018, the claimant brought complaints of harassment related to race, sexual orientation,

religion or belief and/or disability; direct and, in the alternative, indirect religion or belief discrimination; detriment for having made a protected disclosure; and unlawful deductions from wages. The claim is essentially about the alleged behaviour of one of the claimant's colleagues, the way in which the respondent dealt with his subsequent grievance, and separate issues about the requirements for training and attending/completing training courses. The respondent denies the claimant's claims.

2. This hearing was originally listed to take place in public with a time estimate of 4 hours in order to clarify the complaints and issues, and to consider whether any part of the claim should be struck out on the basis that it has no reasonable prospects of success, whether a deposit should be ordered on the basis that any complaint has little prospects of success, and/or whether any part of the claim should be dismissed because it was presented out of time.
3. In the event, following a lengthy discussion the complaints and issues were clarified to a significant extent. Most importantly, the claim form was presented following a period of early conciliation from 3 September to 17 October 2018. During this hearing, the claimant accepted that any act or admission which took place before 4 June 2018 is potentially out of time so that the Tribunal may not have jurisdiction. During the hearing the claimant confirmed that he relies on any historical allegations as background only. The claimant also confirmed that he does not pursue a complaint of harassment related to race, or a disability discrimination claim based on a failure to make reasonable adjustments.
4. The respondent, however, continues to contend that the claimant's complaints of direct religion or belief discrimination, indirect religion or belief discrimination in the alternative, and detriment for having made a protected disclosure are misconceived or have little prospects of success. During the hearing the respondent therefore made a strike out and/or deposit application. The claimant thereafter informed the Tribunal that he had experienced a traumatic personal event and its impact upon his health. Among other things, he explained that he was struggling to respond sensibly to the respondent's application.
5. In the circumstances, the parties therefore effectively agreed to provide written submissions and replies. This course of action was followed at the helpful suggestion of the respondent on the basis that a number of the points contained in its written skeleton argument had fallen away following clarification of the claims and issues.
6. The Tribunal has considered the parties' written submissions and the respondent's oral submissions made at the preliminary hearing with care. They are not repeated here in full, but are summarised below where appropriate. For the avoidance of doubt, any summary of the parties' allegations and arguments below are not intended to bind any subsequent fact-finding Tribunal.

#### Strike out

7. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 provides that all or any part of a claim may be struck out if, among other things, it "*has no reasonable prospect of success*". In **Abertawe Bro Morgannwg University Health Board v Ferguson EAT 0044/13**, the EAT stated that in suitable cases applications for strike-out may save time, expense and anxiety. The power to strike out a claim requires a Tribunal to form a view on the

merits of a case and only where it is satisfied that the claim no reasonable prospect of succeeding can it exercise its power. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail.

8. Special considerations arise if a Tribunal is asked to strike out a claim of discrimination or involving “whistleblowing” on the basis of its prospects of success. Both parties cite the case of **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391**, in which the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.
9. In **Ezsias v North Glamorgan NHS Trust 2007 IRLR 603**, the Court of Appeal confirmed that the same or similar approach should apply to whistleblowing cases in that they will necessarily involve an examination of the reason why the employer acted in the way that it did. Nevertheless, the case of **Ezsias** also confirms that there may be exceptional cases where it may be appropriate to strike out a claim where the central facts are in dispute, such as where the facts sought to be established by the claimant are totally and inexplicably inconsistent with undisputed contemporaneous documentation.
10. The respondent submits that the claimant’s direct religion or belief discrimination complaint is bound to fail. It is based on the respondent’s decision to reject the claimant’s grievance about the way in which one of his colleagues prays during the night shift. The claimant is an atheist and believes that his colleague’s “*right to pray*” has been prioritised over his own absence of belief. Among other things, the respondent contends that this is a “*human rights*” rather than a discrimination complaint.
11. During our discussion of the issues, the claimant acknowledged that he was struggling to understand the legal principles underlying his direct discrimination complaint. In particular, he had failed to appreciate that any necessary comparison would be made not with his colleague but with someone who had brought the same or a similar grievance but did not share his protected characteristic (although it is of course open to the Tribunal to take into account how the circumstances of the claimant’s colleague in determining how a hypothetical comparator would have been treated). Nevertheless, the contention he appeared to settle upon during our discussion (and was accordingly noted in the issues) is that a grievance brought by someone who follows a “*mainstream religion*” would have been taken more seriously. In his reply to the respondent’s application, the claimant accordingly gives the examples of a practising Catholic, Muslim, Jew or Protestant.
12. The respondent further submits that the claimant’s complaint of indirect religion or belief discrimination (brought in the alternative to his direct discrimination complaint) is bound to fail for a similar reason – namely that the claimant will be unable to prove that atheists are placed at a particular disadvantage by the practice of allowing its employees to pray at work in the way of their choosing.
13. The claimant intends to argue that because atheist do not pray or otherwise perform religious observances, he and other such employees are placed at a particular disadvantage by the respondent’s adopted practice or policy. The claimant further argues that there are a variety of uncontentionous measures

which could have been put into place to ensure that no one was disturbed and thereby disadvantaged by the respondent's decision.

14. Finally, the respondent argues that the claimant's complaint of detriment for having made a protected disclosure is bound to fail because his arguments in terms of causation amount to no more than "*bare assertions*" and supposition.
15. The claimant's alleged detriments currently comprise the decision not to pay him in full or reimburse his expenses for a training course, and the respondent's failure to respond to issues raised by the claimant in writing following the said course. The claimant suspects that the relevant decision maker was told about the alleged protected disclosure relied upon and this knowledge affected his actions. His suspicion is based on confidential information about other employees that he says was revealed to him during the investigation of his grievance. The claimant says that at this stage disclosure between the parties is yet to take place and correspondence may exist which confirms his suspicions. He considers that it will also be premature to strike out his complaint prior to the "*veracity*" of the respondent's evidence being tested.
16. In terms of the "whistleblowing" detriment complaint, I also take into account the burden of proof provisions contained within section 48 of the Employment Rights Act 1996. In summary, if the claimant can prove certain elements of his complaint, it will then be for the respondent to prove the reason for any detrimental treatment. Essentially the Tribunal would need to be satisfied that the protected disclosure did not materially influence the respondent's actions. It is also open to a Tribunal to draw inferences as to the real reason for the employer's actions based on its principal findings of fact.
17. Based on what I have read and heard, I reject the respondent's submission that "*there are no facts in dispute in respect of the .... claims*". I am satisfied that there are significant disputes of fact between the parties. The case therefore requires further examination of those facts so as to properly consider whether or not discrimination or detrimental treatment for having made a protected disclosure can be inferred. I have not been shown for example any "*undisputed contemporaneous documentation*" which fatally undermines the claimant's arguments. I am therefore satisfied that this case is not exceptional in the **Ezsias** sense.
18. I cannot therefore properly conclude that the claimant's direct and indirect discrimination complaints, and the complaint of detriment for having made a protected disclosure have no reasonable prospect of succeeding.

#### Deposit order

19. Rule 39(1) of the 2013 Rules of Procedure provides that where at a preliminary hearing a 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*". However, before making an order, the Tribunal must make reasonable enquiries into the ability of the party to pay the deposit, and have regard to any such information when deciding the amount of the deposit (rule 39(2)).
20. When determining whether to make a deposit order, a Tribunal is not restricted to a consideration of purely legal issues but is also entitled to have regard to the likelihood of the party being able to establish the facts essential

to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (**Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0096/07**). In any event, 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*”.

21. On an objective assessment of what I have read and heard, including the arguments set out above, I am satisfied that there is currently no proper basis for doubting the likelihood of the claimant being able to establish the facts essential to the complaints in question. My provisional view is that much will depend upon the contemporaneous evidence and the credibility of any witnesses. It does not automatically follow that, because the respondent disagrees with the claimant's arguments and central facts are disputed, that the claimant's complaints in question accordingly have little reasonable prospects of success.
22. In the circumstances, I have therefore declined to make a separate deposit order in respect of the claimant's complaints of direct and indirect religion or belief discrimination, and detriment for having made a protected disclosure.
23. That said, the claimant should take advice if he can on the substantive merits of the complaints in question as the parties proceed to comply with the case management orders made separately. For example, in terms of the whistleblowing complaint it would be regrettable if his suspicions were indeed misplaced.

Employment Judge Licorish

Date: 05 April 2019

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