



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000074/2023**

**Held in Dundee remotely by CVP on 14 August 2023**

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**Employment Judge Sutherland**

**Interpreter:  
Ms M Spiridonova**

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**Miss Kostadinka Dzhoykeva**

**Claimant  
In person**

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**D A Baillie Limited**

**Respondent  
Represented by  
Ms J McLaughlan,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the Respondent's application for strike out of the complaints is refused.

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**REASONS**

**Introduction**

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1. The Claimant has made complaints of direct race and/or religious discrimination and harassment, automatically unfair dismissal by reason of whistleblowing, unauthorized deduction from wages (for failure to pay overtime and for deduction of utility costs and failure to pay holiday pay) and failure to provide weekly rest breaks.
2. An open preliminary hearing was listed to determine the following issues –

- a. Whether the Claimant's application to amend should be allowed
  - b. whether the complaints should be struck out on the grounds of no reasonable prospects of success.
3. The Claimant appeared on her own behalf and relied upon an interpreter.  
5 The Respondent had professional representation.
  4. Following discussion with the parties it was agreed that the application to amend would be heard in the morning, that oral judgement would be issued and that the application for strike out would then be heard in the afternoon.
  5. As narrated in the oral judgment, the following applications to amend were  
10 allowed: to include a complaint for deduction of utility costs as specified and to include a complaint for failure to provide weekly rest under Regulation 11 as specified. It was determined that there was no application to amend to include a complaint for failure to provide daily rest under Regulation 10 (because no detail was provided), there was no application to include a  
15 complaint for failure to provide 20 mins break a day under Regulation 12 (because she stated she was given 30 minutes break), and that there was no application to amend to include a complaint for automatically unfair dismissal by reason of whistleblowing (because the claimant stated that she had resigned). The Claimant indicated that she may wish to make an  
20 application to amend to include a complaint of automatically unfair constructive dismissal (that she resigned by reason of her employer's conduct which conduct amounted to detrimental treatment because of a protected disclosure). This issue shall be dealt with by way of further orders which shall be issued separately.
  - 25 6. Parties had each prepared a joint bundle of documents for consideration at this hearing.
  7. No witness gave oral testimony at this hearing.
  8. Both parties made oral submissions.

### **The complaints**

9. Having regard to her claim and additional information provided including at today's hearing the Claimant's complaints are as follows:

*Discrimination/ harassment*

10. The Claimant asserts that Stanislav Bohaterevich, a Polish national who  
5 was employed as a supervisor in the warehouse when the managers were not there, because of or related to her race (namely her Bulgarian nationality / ethnicity) and/or because of or related to her Christian religion or beliefs:
- a. throughout the period of the claimant's employment, made the claimant lift heavy items and mocked her;
  - 10 b. throughout her employment, referred to the claimant as 'fat' and as 'Bulgarian rubbish';
  - c. on a number of occasions, including in March 2021 and in April 2021, threw the potatoes they were farming at the claimant, physically hurting her;
  - 15 d. on an almost daily basis, the last occasion being in November 2022, drove a forklift truck directly at the claimant at high speed in the warehouse, causing her alarm and distress;
  - e. on a number of occasions, the last of which took place in November 2022, threatened to hit and assault the claimant when she asked him to  
20 stop his conduct towards her;
  - f. on a regular basis, the last occasion being in November 2022, shouted at the claimant whenever she left to go to the toilet that she was not there to go to the toilet; she was there to work;
  - g. in November 2022, told the claimant that there was a surprise waiting  
25 for her in the toilet, where he had drawn pictures of penises on the toilet door;
  - h. frequently threatened the claimant throughout her employment and made bad gestures towards her accompanied by statements like: "You die you fucking Bulgarian; Go to your God" and "I'll send you to your  
30 God".
  - i. in November 2022, when the claimant went to the toilet, told the claimant: "I will buy a gun and shoot you".

*Automatically unfair dismissal and detriment by reason of whistleblowing*

11. The Claimant asserts that she made oral complaints to Gavin Baillie and John Baillie about once every one or two months during her employment, and by email towards end November 2022, describing discrimination and harassment by Stanislav Bohaterevich (which she asserts amounted to protected disclosures) and that these disclosures caused her dismissal and her prior detriment.

12. The Claimant did not specify any detrimental treatment. During the course of the hearing on amendment the Claimant advised that she had not been dismissed but had resigned.

*Failure to pay holidays*

13. The Claimant seeks payment of the following holidays during the periods she was not working: 23 July to 2 September 2021; 23 December 2021 to 27 January 2022; 27 July to 11 September 2022.

*Failure to pay overtime*

14. The Claimant seeks payment of overtime when she worked Saturdays and Sundays on various specified dates in September to December 2021 and September to November 2022.

*Unlawful deductions from wages re utilities*

15. The Claimant makes a complaint in respect of specified deductions made in respect of utilities on various specified dates in September to November 2022.

*Failure to give weekly rest*

16. The Claimant makes a complaint of failure to give weekly rest under Regulation 11 of the Working Time Regulations 1998 (or compensatory rest under Regulation 24) in the period from 3 September to 26 November 2021 and from 12 September to 24 November 2022.

**Facts not in dispute**

17. The following facts were not in dispute -
18. The Claimant is of Bulgarian nationality.
19. The Respondent operates an arable farm in Perthshire.
- 5 20. The claimant undertook work for the Respondent on the farm as a harvester/  
grader. She worked intermittently from 15 November 2018 to 24 November  
2022. The Claimant lived in a caravan on or near the farm. The work was  
seasonal and each year she did not undertake any work or receive any pay  
for over 1 month in December/January and again in August. The Claimant  
10 was issued with a new contract in September of each year.
21. If the Claimant is an agricultural worker, the minimum rate of pay due under  
the Agricultural Wages (Scotland) Order was £8.91 from 1 April 2021 and  
£9.50 from 1 April 2022.

**Contemporaneous documentation**

- 15 22. The contemporaneous documentation contained with the bundles of  
documents provided by the parties is summarised as follows -
23. The Claimant was issued with a contract in September each year which in  
2021 and 2022 stated that –
- a. She was employed as a casual worker.
- 20 b. She would be paid an hourly rate. From September 2021 she would  
be paid £8.91 with overtime at time and half after 8 hours work in any  
day or 48 hours worked in the week. From September 2022 she  
would be paid £10.50.
- c. Her holiday entitlement was 5.6 weeks a year pro-rated. (The  
25 contract did not reference rolled up holiday pay.)
- d. She would be given a pay slip for each week that she worked which  
will show the days and hours worked; the hourly rate of pay

applicable for each week; and the resultant wage to which she is entitled.

e. The farm usually works 5 days a week, 8 hours a day but there is no guaranteed hours of work.

5 f. A facility charge in respect of accommodation of £8.20 a day will be deducted from wages

24. The 2021 contract appeared to have been signed by the Claimant but the 2022 contract did not.

10 25. The Claimant was issued with pay slips for weeks that she worked in 2022 which stated her total hours of work for that week and her rate of pay which was £9.50 until September and £10.50 thereafter. From September 2022 it also showed deductions for utilities of varying amounts ranging from £10.58 to £39.40. The pay slips did not identify a separate payment for holidays (the Respondent advises having paid rolled up holiday pay).

15 **Procedural history**

26. The Claimant initiated ACAS Early Conciliation on 21 December 2022. The Early Conciliation Certificate was issued on 1 February 2023.

27. The claim was lodged with the Employment Tribunal on 24 February 2023.

20 28. A Case Management Preliminary Hearing was held on 5 May 2023 at which the Claimant provided further particulars of her complaints of discrimination/ harassment, unpaid holidays, and unpaid overtime. A Case Management Preliminary Hearing was held on 7 June 2023 at which the Claimant provided further particulars of her complaints of unlawful deduction of wages (deduction of utility costs) and of protected disclosures.

25 29. On 28 June 2023 the Claimant provided further written particulars of her complaints of failure to pay overtime and failure to pay holidays.

**The law on strike out**

30. Under Rule 37(1) of the Employment Tribunal Rules of Procedure, a Tribunal may strike out all or part of a claim or response on various grounds including-

(a) *that it is scandalous or vexatious or has no reasonable prospects of success.*

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31. In light of the severe consequences of strike out, such a decision is considered a draconian step which should only be taken on the clearest grounds and as a matter of last resort. Its purpose is not to punish the conduct but rather to protect the other party from the consequences of the conduct (*Bolch v Chipman [2004] IRLR 140, EAT*).

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32. Before making a strike out order, the tribunal must give the relevant party a reasonable opportunity to make representations, either in writing or, if requested by that party, at a hearing.

*No reasonable prospects*

15 33. Having regard to the legal authorities referred to below the following is noted: strike-out on grounds of no reasonable prospects is considered by means of a summary determination; where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts; exceptional circumstances may arise where disputed facts are totally and inexplicably inconsistent with undisputed contemporaneous documentation; discrimination and unfair dismissal cases are generally fact sensitive and therefore strike out on this ground is exceptional; where there are no reasonable prospects the Tribunal must decide whether to exercise its discretion mindful that full evidence has not been heard, although the Tribunal should not be deterred in the most obvious of cases.

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34. The House of Lords in *Anyanwu and Ors v South Bank Students' Union and Ors [2001] IRLR 305* per Lord Steyn (par 24):

*“such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most*

*obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest”*

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35. The Court of Appeal in *Ezias v North Glamorgan NHS Trust [2007] ICR 1126*, per Maurice Kay LJ:

(Para 27) *“what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success... However, what is important is the particular nature and scope of the factual dispute in question... there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success”*

(Para 29) *“there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise...It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.”*

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36. The Court of Session in *Tayside Public Transport Company Ltd (t/a Travel Dundee) v Reilly [2012] Scot CS CSIH 46*, per Lord Justice Clerk –

25 [29] *“The power of the ET to strike out a claim at a pre-hearing review may be exercised only where the ET determines that the claim “has no reasonable prospect of success”...Even if the Tribunal so determines, it retains a discretion not to strike out the claim”.*

[30] *“the power conferred ... may be exercised only in rare circumstances. It has been described as draconian ... In almost every*

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5 case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd v Patel* (2003) CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions... But in the normal case  
10 where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out..."

[33]... the Tribunal will have to assess both the substantive issues...the fairness of the procedures by which the decision to dismiss was reached (*British Home Stores Ltd v Burchell* [1980] ICR 301; *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17; *Foley v Post Office*; *HSBC Bank v Madden* [2000] IRLR 827; *Employment Rights Act 1996, s 98(4), supra*).  
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[34]... In my view, he should have considered whether a full Tribunal conducting a formal hearing into the claim might have fuller information before it than he had".  
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37. The Employment Appeal Tribunal in *Mechkarov v Citibank NA* UKEAT/0041/16/DM, having reviewed *Anyanwu*, *Ezsias* and *Tayside*, per Mr Justice Mitting (para 14):

25 "On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively  
30 disproved by" or is "totally and inexplicably inconsistent" with undisputed

*contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts”.*

5 38. The Court of Appeal in *Ahir v British Airways Pic* [2017] EWCA Civ 1392 per Underhill LJ (para16):

10 *“Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment”*

15 39. And Lord Hope (par 37):

20 *“I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence.”*

### **Respondent’s submissions**

25 40. The Respondent’s oral submissions were in summary that the complaints had no reasonable prospects on the following grounds –

#### *Harassment/ discrimination*

- a. The Claimant has failed to specify dates on which the acts of discrimination occurred.

b. The Claimant has failed to specify a comparator who was treated more favourably.

c. The Claimant has failed to set out facts from which it could be inferred that she was treated less favourably because of her race/ religion and/or subjected to unwanted conduct related to her race or religion (*Barton v Investec Henderson [2003] I.R.L.R. 332, EAT*)

#### *Failure to pay holidays*

d. The Respondent has paid rolled up holiday pay. Complaints for holiday pay arising prior to 22 September 2022 are time barred. There is a gap of more than 3 months between the relevant holiday periods which breaks any alleged series of deductions (*Bear Scotland Ltd [2015] I.R.L.R. 15*).

#### *Failure to pay overtime*

e. Her contract does not specify any entitlement to overtime in respect of weekend working.

### **Claimant's submissions**

41. The Claimant's oral submissions were in summary as follows -

a. She is a litigant in person who does not speak English.

b. She was unsure of her legal rights but took advice from ACAS.

c. She is due overtime, holiday pay and compensation for failure to give weekly rest.

d. She is willing to give further information regarding her complaints if required.

### **Discussion and decision**

#### *Harassment/discrimination*

42. The Claimant has described treatment to which she was subjected. For

some treatment she has described this as having occurred “throughout her employment”. Given that this was a period of 4 years it would be reasonable to require the Claimant to specify the frequency of that treatment e.g. daily, weekly, monthly.

5 43. The treatment described by the Claimant includes comments made about her race and religion (“Bulgarian rubbish”; “You die you fucking Bulgarian; Go to your God;” and “I’ll send you to your God”). Contrary to the Respondent’s submission, the Claimant has specified facts from which an inference of discrimination could be drawn and further it is open to her to  
10 rely upon a hypothetical comparator. It would however be reasonable to require to the Claimant to specify other facts (if any) relied upon by her to infer that this treatment was because of or related to her race and/or religion and to confirm whether or not she seeks to rely upon a named individual comparator.

15 44. Strike out is a draconian step and measure of last resort. Her complaint of discrimination is entirely fact sensitive and therefore requires determination at a final hearing. It cannot reasonably be stated that this complaint has no reasonable prospects of success. Any need for further specification can be dealt with by orders which will be issued separately.

20 *Failure to pay holidays*

45. The Claimant seeks payment of the following holidays during the periods she was not working: 23 July to 2 September 2021; 23 December 2021 to 27 January 2022; 27 July to 11 September 2022. The Claimant appeared to be seeking payment for over 60 holidays a year but it was clarified in the  
25 hearing that she sought her contractual and/or statutory entitlement. Under statute and contract it appears that the Claimant was entitled to approximately 23 days holiday a year (28 days holiday x 10 months worked / 12 months a year) (plus 2 days at Christmas if the Agricultural Wages (Scotland) Order applies). The Claimant did not receive a separate payment  
30 for holidays and the Respondent asserts having paid rolled-up holiday pay but had not specified the rolled-up element.

46. Holidays which were accrued but untaken at the end of each period of employment would fall due to be paid then. The Claimant asserts working from January to July 2021, September to December 2021, January to July 2022 and September to November 2022. That would give rise to a gap of more than 3 months between any sums due at the end of July 2022 and any sums due at the end of November 2022 but it would be open to the Claimant to assert that it was not reasonably practicable for her complaint to be presented within 3 months, etc.
47. The Claimant does not assert any facts which are totally and inexplicably inconsistent with undisputed documentation. Indeed the documentation appears to support her assertions that she did not receive holiday pay. It cannot reasonably be said that this complaint has no reasonable prospects of success.
48. Once the Respondent has adjusted their pleadings in response to this complaint (that she is due payment for holidays accrued in 2021 and 2022) including any assertions of time bar, it would be reasonable to require the Claimant to specify any facts relied upon in response to any assertion of time bar.

*Failure to pay overtime*

49. The Claimant seeks payment of overtime when she worked Saturdays and Sundays on various specified dates in September to December 2021 and September to November 2022.
50. Neither her contract nor the Agricultural Wages (Scotland) Order specifies any entitlement to overtime in respect of weekend working. However, her contract and the Order refers to payment of overtime for working in excess of 8 hours a day and 48 hours a week (and under the Order, 39 hours for over 26 weeks continuous service).
51. The Claimant asserts having worked in excess of 8 hours a day and/or 48 hours a week. This assertion is not totally and inexplicably inconsistent with undisputed documentation. Indeed the documentation appears to support

this assertion. It cannot reasonably be said that her complaint regarding overtime has no reasonable prospects of success.

52. Her contract states that she would be given a pay slip for each week that she worked which would show the days and hours worked. The Claimant  
5 advises that she has never been provided with this information. The need for disclosure of this information will be dealt with by orders to be issued separately.

53. Once the Claimant has received this information it would be reasonable to require the Claimant to specify her complaint for failure to pay overtime.

10 *Unlawful deductions from wages re utilities*

54. The Respondent did not insist upon its application for strike out in relation to this complaint.

*Failure to give weekly rest*

55. The Respondent did not insist upon its application for strike out in relation to  
15 this complaint.

56. The application for strike out on grounds of no reasonable prospects is accordingly refused.

20 Employment Judge : M Sutherland  
Date of Judgment : 16 August 2023  
Date sent to parties : 22 August 2023