



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103110/2022 Preliminary Hearing at Edinburgh on 15 September  
2022

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Employment Judge: M A Macleod

Dariya Krasnova

Claimant  
In Person

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The Scottish Ministers

Respondent  
Represented by  
Ms E Campbell  
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim is  
struck out under Rule 37(1)(a) of the Employment Tribunals Rules of  
Procedure 2013, on the grounds that it lacks any reasonable prospect of  
success.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on 6 June 2022  
in which she complained that she had been 'discriminated by wrongly  
assumed nationality', in her application for employment with the  
respondent.

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2. The respondent submitted an ET3 resisting the claimant's claim and arguing that her claim had no reasonable prospect of success.
3. On 6 July 2022, the respondent presented an application for strike out of the claimant's claim under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.  
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4. A Preliminary Hearing (Closed) took place on 5 August 2022 before Employment Judge d'Invemo. Following that Hearing, the Employment Judge issued a Note including Order (Fifth), which appointed the case to a one day Preliminary Hearing for determination of the respondent's application for strike out on 15 September 2022.  
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5. The Preliminary Hearing (Open) took place on the scheduled date. The claimant appeared on her own behalf, and Ms Campbell, solicitor, appeared for the respondent.
6. A Bundle of Documents was presented to the Tribunal for use at the Hearing, and the respondent also provided a skeleton submission in support of the application.  
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7. It is appropriate to set out the details of the application, the further clarification of the claim, the respondent's submission and the claimants response, before issuing the Tribunal's determination on this matter.

#### 20 Application for Strike Out

8. The respondent's application (38ff) confirmed that the claimant unsuccessfully applied for a role with the respondent as a Smart Project Manager in February 2022, and that she alleges that she was discriminated against by wrongly assumed nationality. The claim relies upon an email from the respondent dated 18 February 2022, which notified the claimant that she did not meet the Civil Service Nationality Rules (CNSR) and therefore that she was not eligible for employment with the respondent.  
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9. The respondent argued that while the email was issued to the claimant, the full factual background was not provided in the ET1. They submitted that

while the claimant's application was originally rejected on 18 February 2022 it was in fact reinstated and considered. The reason for the original rejection was that the claimant's application had noted that she held Russian nationality. She had responded to the pre-screening questions by indicating that she held Russian nationality by birth and had held another nationality and citizenship, without providing further information. She was therefore assessed for eligibility on the basis of Russian nationality.

10. They stated that the CNSR provide that only nationals from the United Kingdom, the Republic of Ireland and the Commonwealth were eligible. In addition, exceptions to the general rule existed for certain European Economic Area (EEA), Swiss and Turkish nationals.

11. After receiving the email of 18 February 2022, the claimant contacted the respondent to indicate that while she was a Russian national by birth, she held German citizenship with pre-settled status. The respondent stated that they carried out checks on her citizenship and right to work, and while doing so reinstated and considered her application.

12. The respondent went on to submit that when her application was considered, she was scored and sifted as not meeting the required standard to be invited to assessment on the grounds that it provided insufficient evidence of the required essential criteria.

13. They advised the claimant in detail on 7 March 2022 why her application had been unsuccessful.

14. The respondent's application went on to cite the relevant legislation upon which they sought to rely:

- Rule 37 of the Employment Tribunals Rules of Procedure 2013;
- Section 3, Act of Settlement 1700;
- Section 51(4), British Nationality Act 1981;
- Sections 6 & 13, Aliens Restriction (Amendment) Act 1919 ;

- Sections 1(1)(c) & 1(5), Aliens' Employment Act 1955 ;
- Paragraph 5, Schedule 22, Equality Act 2010.

15. So far as the application for strike out was concerned, the respondent argued that the claimant's claim was sparse in its specification and that the respondent was not clear on the claim which it had to meet. In addition, the respondent said that the claim did not specify the statutory provisions relied upon by the claimant, nor has she made out any case that the respondent discriminated against her. There is, they argue, insufficient specification of any discriminatory conduct to which she was subject.

16. The respondent submitted that the claimant's claim does not take account of the full background into which these events fall, and fails to refer to the complete process whereby the application was rejected, reinstated, considered and rejected again.

17. Further, the respondent argued that even if a valid claim were specified, the claimant cannot succeed as no unlawful discrimination ever occurred. The respondent is bound by the CSNR, under Rule 1 of which a Russian national comes into the category of "alien", a category of person which the respondent is prevented from employing.

18. The application made reference to the statutory provisions listed above, and submitted that the respondent could not lawfully have found the claimant eligible for consideration for employment on 18 February 2022. The implementation of the CSNR does not contravene the Equality Act 2010 by virtue of paragraph 5 of Schedule 22 to the 2010 Act, which provides that the respondent cannot breach the 2010 Act by implementing rules which restrict employment in the service of the Crown to persons of a particular birth, nationality, descent or residence.

19. While there are exceptions, the claimant did not fall into any of them, they submitted. In any event, once the claimant provided further information to demonstrate that she was a "relevant European", she met the CSNR in relation to one of her nationalities. Her application was therefore scored and

sifted, but did not meet the required standard and was therefore unsuccessful.

20. Accordingly, the application concluded, the claimant's claim has no reasonable prospect of success and should be dismissed. Reference was made to the Tribunal's overriding objective to deal with cases fairly and justly, an objective which cannot be achieved by claims which have no reasonable prospect of success and ultimately "clog up" the Tribunal system and contribute to inefficient litigation.

#### Further Clarification

21. In the Note following Preliminary Hearing dated 5 August 2022, Employment Judge d'Inverno noted that the claimant confirmed the following orally during that Hearing:

- (a) "The protected characteristic upon which she founds is that of Race (section 9 of the Equality Act 2010);
- (b) That the claimant defines herself for the purposes of her claim and of the protected characteristic as 'of German nationality';
- (c) That the claimant intends to give notice of a complaint of Direct Discrimination in terms of section 13 of the Equality Act 2010;
- (d) That the less favourable treatment of which the claimant complains is the respondent's failure to apologise to her for assuming that she was of Russian nationality."

22. What follows is based upon that clarification of the claim.

#### Respondent's Submission

23. Ms Campbell tendered a skeleton written submission, to which she spoke before me. A short summary of her submission is set out here.

24. In that written submission, she confirmed at paragraph 3 that the application for strike out was primarily on the basis that the claimant had failed to

provide a valid comparator and therefore her claim is bound to fail; and at paragraph 4, that if the Tribunal did not accept that submission, the alleged less favourable treatment was entirely unrelated to the claimants protected characteristic of race; and that if the Tribunal did not accept that submission, the alleged less favourable treatment was lawful, being justified by virtue of Schedule 22, paragraph 5(1)(b) of the 2010 Act, relating to the claimant's nationality.

25. Referring to the Agreed Statement of Facts, she submitted that it was not in dispute that the claimant's application form stated that she was of Russian birth; accordingly there was no need to apologise for the respondent's actions. In any event, the motivation for failing to apologise for their actions could not have been because of her German nationality.

26. As to the comparator relied upon, as set out in the claimant's email to the Tribunal and to the respondent on 15 August 2022 (58), the claimant had said that "A person who has German nationality by birth is an appropriate comparator. The claimant (myself) has a German nationality by naturalization."

27. Ms Campbell submitted that a person with German nationality by naturalization or by birth would, in both circumstances, be of German nationality and thus be of the same race. She referred to a number of authorities, and to the Equality and Human Rights Commission (EHRC) Code, which states, at paragraph 2.38, that nationality is "the specific legal relationship between a person and a state through birth or naturalization", and argued that the distinction is therefore irrelevant.

28. She submitted, therefore, that the claim is bound to fail.

29. She moved then to submit that the alleged less favourable treatment is not because of the claimant's protected characteristic of race, being German nationality, and therefore this cannot amount to direct discrimination under section 13 of the 2010 Act. The Tribunal must ask itself what the reason for the treatment was. She submitted that even without hearing all of the facts, it is not credible for the claimant to argue that the respondent failed to

apologise to her for assuming she was of Russian nationality, because of her race, of German nationality. The reason why there was no apology for assuming she was Russian can clearly be seen from the agreed facts and context. The claimant stated her nationality at birth was Russian and consequently the need to apologise did not arise. She did not mention her German nationality in the form. Ms Campbell went on to argue that the respondent reconsidered the matter on being informed that she had settled German status, and so there remained no need to apologise. The motivation for failing to apologise could not have been because of her German nationality.

30. Ms Campbell then submitted that if the Tribunal were not prepared to accept either of these arguments, then the respondent had acted on the basis of the facts presented by the claimant in her application form, namely that she was of Russian birth, and assessed her as a Russian national.

31. She argued that the claimant is by definition an alien within the meaning given under the British Nationality Act 1981 and Rule 1 of the CSNR. Essentially, the respondent was only following what was required of it under statute. The claimant has not demonstrated that she is a "relevant European", which would bring her within the exception permitted.

#### 20 **Claimant's Response**

32. The claimant made a submission in response, which is summarised briefly here.

33. She insisted that she had never agreed that she still held Russian nationality. Nowhere in the application form is there an indication as to her current nationality. The application was rejected, and when she asked why she did not meet the Civil Service requirements, the respondent did not provide an explanation. She submitted complaints to the respondent, but was never provided with an answer.

34. She said that she was never aware that the application had been reinstated, but believed that she was being ignored. Even when she went to ACAS to obtain an explanation, she was ignored.
- 5 35. The comparator is appropriate, she argued, because she had submitted an email saying that her nationality was German, whereupon her application was then rejected. She never received an explanation as to why she had been treated in this way. She believed it was because she was Russian. She argued that someone who was German by birth would have been treated differently.
- 10 36. She submitted that she was treated less favourably because her nationality was Russian: however, she went on to say that she was treated that way not because she was of Russian nationality, but because she was perceived to have been Russian.
- 15 37. She reiterated, several times, that she was never provided with an explanation as to why she was treated that way.
38. She said that she had worked hard to get where she had got to, and she was trying to “forget my Russian nationality”, stressing that she did not support the current situation.

#### Discussion and Decision

- 20 39. It is appropriate to address the application for strike out in the way in which it has been presented in this Hearing.
40. Firstly, the respondent argues that the claimant’s claim of direct discrimination on the grounds of race (namely German nationality X paragraph (First)(b) of Employment Judge d’Inverno’s Order of 5 August 2022) is bound to fail on the basis that she has failed to provide a valid comparator.
- 25 41. The claimant has stated, in her email of 15 August, that her comparator is “A person who has German nationality by birth is an appropriate

comparator. The claimant (myself) has a German nationality by naturalization.”

5 42. The Tribunal requires to take consideration of the fact that the claimant is not represented, nor is she a qualified lawyer, and as a result cannot be expected to present her case to a professional standard. At the same time, the Tribunal must address the claim as it has been presented by the claimant.

10 43. As I understand it, the claimant complains that she was treated less favourably by the respondent because they failed to apologise to her for assuming that she was a Russian national; and that she regards this as less favourable treatment on the grounds of race, namely her German naturalization.

15 44. With the greatest of respect to the claimant, it is very difficult to understand her claim. Her claim of race discrimination is essentially that she was treated less favourably because she was a naturalized German citizen. She seeks to rely upon a German citizen by birth as a comparator. On this point, I agree with the respondent's submission that it is not possible to make a distinction, in the category of race under the Equality Act 2010, between German citizens who have come by that status by different means.

20 45. In any event, it does not appear to me that the claimant is seeking to argue that she was treated less favourably due to being German at all; she is claiming that she was treated less favourably because she was, or was perceived to be, Russian. Her German citizenship cannot be the explanation for her less favourable treatment.

25 46. The claimant has a number of difficulties in advancing her claim:

- She has identified a German person by birth as a comparator with herself, a naturalized German citizen, an invalid comparison;
- Her claim does not rely upon her being a German citizen, but as being assumed to be Russian; and

- She believes the less favourable treatment to have taken place not because she was Russian, but on the grounds that she was, in fact, German but assumed to be Russian.

5 47. The claimant has therefore failed to identify a suitable comparator in relation to her direct discrimination claim. A German person has the same protected characteristic of their German nationality whether they came by that status by birth or by naturalization.

10 48. The second aspect of the respondent's application for strike out is their submission that her treatment was not because of her German nationality at all. As a result, she has failed to provide the foundation for a direct discrimination claim on the grounds of being German, the protected characteristic upon which she relies, since she is not ultimately saying that she was treated less favourably because she was German but because the respondent considered her to be Russian.

15 49. This is a persuasive argument. It may be difficult to see how the claimant can advance her claim while relying upon her German nationality, and without shifting her position and relying upon being Russian (when she has repudiated that status), but the Tribunal requires to address the claim as it is presented.

20 50. Accordingly, it is my conclusion that the claimant cannot succeed in her complaint of race discrimination on the grounds of German nationality because she is not, in fact, alleging that that status was the reason for her treatment.

25 51. The third aspect of the respondent's submission is that the claimant's claim cannot succeed, since the respondent was only abiding by the statutory requirements upon them, which required them to exclude all those who did not meet the definition within the CSNR or the other legislation referred to.

52. Again, this is an attractive argument.

30 53. There is, however, an important aspect to this case which has not been specifically addressed by the respondent in their submissions. Ms

Campbell focused on the fact that in her application to the respondent, the claimant referred to her Russian birth. It is important to note, though, that the Joint Statement of Agreed Facts states, at paragraph 2: "The Claimant declared that she held Russian nationality at birth and also possessed another nationality or citizenship. No information was provided on what other nationality or citizenship was held when the application was originally submitted to the Respondent on 16 February 2022." (Tribunal's emphasis).

54. The fact that the claimant made reference not only to her Russian birthplace but also to holding another nationality may be a fact of significance in the context of this claim.. The claimant complains that the respondent rejected her application without explanation. There is no indication that the respondent took account of the fact that while the claimant was born in Russia she was stating that she held a different nationality on her application form. That different nationality is now known to be her German citizenship.

55. Since the claim is that the respondent treated her less favourably by failing to apologise for assuming that she was Russian, it appears to me that her complaint should be read (in light of the statement which has been agreed by both parties) as saying that she was treated less favourably by the respondent by their assumption that her Russian birth meant that she was, at the date of the application, still a Russian citizen, an assumption which cannot be a safe one standing the admission that she told them that she held another nationality. It appears to me that the claimant did indicate to the respondent that her Russian birth was not necessarily definitive of her nationality, and that because they assumed that to be the case, without pursuing the matter with the claimant, there may be a basis upon which the claimant could conceivably argue that that then led to the respondent's failure to apologise being regarded as unlawful discrimination on the grounds of race.

56. Standing the conclusions reached on the first two points made by the respondent, however, this particular discussion may be seen to be academic.

57. However, notwithstanding the position adopted in relation to the first two points, the Tribunal still requires to determine whether the application to strike the claim out should be granted, in all the circumstances.

58. The authorities suggest that Tribunals should be very reluctant to strike out a claim of discrimination without the evidence on the facts being led, especially where, as here, there is a dispute as to the facts and to the interpretation of those facts between the parties.

59. The well-known case of Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 CA provides helpful guidance in considering whether to strike out a claim involving whistleblowing allegations, and said that the same approach should be taken in such cases as requires to be taken in discrimination claims, which require an investigation to be conducted into why an employer acted in a particular way. It was stressed that only in an exceptional case will a case be struck out as having no reasonable prospect of success where the central facts are in dispute.

60. It appears to me that in this case, the Tribunal is faced with a claim which, as currently pled, has no reasonable prospect of success, given that the claimant has failed to identify a suitable comparator, and that the basis upon which she maintains that she was discriminated on the grounds of race, being of German nationality, cannot provide the foundation for a successful claim in the circumstances of this case.

6.1. It falls, in my judgment, into the category of exceptional cases in which the case can be struck out as having no reasonable prospect of success. The facts are not materially in dispute; the claimant's understanding at the time may have been limited but the actions of the respondent are in essence set out in the Joint Statement of Agreed Facts.

62. What causes me some hesitation in determining this matter is whether, given the claimant's status as an unqualified self-representing litigant, she should be allowed the opportunity to amend her claim on one more occasion to identify the possible basis of her claim. A Tribunal requires to

take consideration of the claimant's lack of knowledge and understanding of the very complex legal provisions underpinning direct discrimination claims.

63. However, in the circumstances of this case, I am driven to the conclusion that further case management is unlikely to achieve a different outcome.

5 What the claimant complains of, namely that she was discriminated against on the grounds of being a naturalized German citizen as opposed to a citizen by birth, cannot conceivably succeed, nor can her claim that she was discriminated against on the grounds of being German.

64J accept that her claim initially suggested that she was pursuing her  
10 complaint on the basis that she was perceived to have had Russian nationality, but that is not the basis of the claim now pursued, as clarified by her before Employment Judge d'Inverno and her further email.

65. Accordingly, albeit with some hesitation, I have come to the conclusion that the claimant's claim has no reasonable prospect of success, and as a  
15 result, it is struck out under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

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**Employment Judge: M Macleod**  
**Date of Judgment: 19 October 2022**  
**Entered in register: 19 October 2022**  
25 **and copied to parties**

