Case Number 2501733/17

THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms B Gbefa	Primary Care Recruitment Ltd (R1) ID Support (R2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

At a public preliminary hearing

HELD AT NORTH SHIELDS ON 27th February 2018
EMPLOYMENT JUDGE GARNON (sitting alone)

Appearances
For Claimant Mr Gbefa Husband
For R1 Ms S Brewis of Counsel
For R2 Mr J R Buckle Consultant

JUDGMENT

The Judgment of the Tribunal is

1 The claim of breach of contract is withdrawn but will not be dismissed.
2 The claims against R2 are dismissed on withdrawal.
3. The application by R2 for a costs order is refused.

REASONS

1 . The relevant facts

1.1. The claimant brought a claim of pregnancy discrimination against R1 which was found proved on 29th April 2015. Remedy was to be decided at a later date. That Tribunal chaired by Employment Judge Hunter found the claimant was "employed" by R1 within the definition of employment in the Equality Act 2010 (EqA) which is a broader definition than that under the Employment Tribunals Act 1996 (ETA) . It is the latter , narrower, definition which applies to claims of breach of contract under The Employment Tribunals (Extension of Jurisdiction) Order 1994 ("the Order). The Order only confers on Employment Tribunals jurisdiction to determine claims of breaches of, or connected to, contacts of employment if the breach arises or is outstanding upon termination of employment.

1.2. Remedy was settled by through ACAS by a CoT3 agreement on 17th June 2015. Among its terms was R1 would provide a reference to any future prospective employer in agreed terms. The claimant alleges that term has been breached.

1.3. When a claim arrives at the Tribunal it is examined by a clerk to check whether it should be rejected on one of the grounds in Rule 12 of the Employment Tribunal Rules of Procedure 2013 (the Rules), the first of which is that it is a claim the Tribunal has no jurisdiction to consider. If the clerk believes that may be so , he refers it to a Judge , which on this occasion happened to be me. There was no doubt the claim of post termination victimisation against R1 and victimisation of the claimant as a job applicant to R2 were claims the Tribunal had exclusive jurisdiction to consider. But the breach of contract claim was different. I made a contemporaneous note of my decision to accept that claim too saying the Court of appeal in Rock It Cargo _v_ Green held a Tribunal could consider breach of a CoT3 agreement as being a contract "connected with employment " provided the CoT 3 pre-dated termination but in Miller-v-Johnson held it had no jurisdiction if the CoT3 post-dated termination. I could not tell from the claim form whether the claimant's employment had ended when the CoT3 was signed , nor could I tell whether she was an employee for the purposes of the Order. If it turned out the CoT 3 post-dated termination or that the claimant did not come within the narrower definition of employment this claim would fail, but it could not be rejected without those points being determined. The claim was accepted and served.

1.4.1. Ms Victoria Hartley on behalf of R2 repeats in her witness statement what had been pleaded by R2 as its defence . She has been employed since July 2005 latterly as Recruitment and Administration Manager R2 recruited for a Support Worker in August 2017. The claimant applied and was interviewed on Monday 7th August 2017. She was successful at interview and was sent an offer of employment on Tuesday 8th August 2017. R2 is governed by the Care Quality Commission (CQC). They require employment references so the claimant was asked to provide contacts for references and nominated R1.

1.4.2. On 11th August 2017, Ms Hartley emailed Joanne Wood of R1 requesting they complete and return a reference request form. She received a response at 14:16 from an employee called Andrew Chandler, who provided employment dates starting and finishing date 21st August 2014. No further information was provided. The information contradicted that provided by the claimant. so Ms Hartley contacted the claimant by telephone asking if she had made an error. She said she had not.

1.4.3. On Monday 14th August 2017 Ms Hartley made a phone call to R1 to ascertain if they had made a mistake in their reference provided. Someone whose name she does not recall advised her the reference was correct and would not be retracted. Given CQC require proper references Ms Hartley asked if they could provide more information. They said they would not legally inform R2 of any issues and **that they would not re-employ nor give a better response.**

1.4.4. Ms Hartley would have continued to consider employing the claimant had R1 provided a satisfactory reference. Ms Hartley could not progress with the claimant's employment due to the unsatisfactory reference which indicated the claimant had not told the truth on her application form. Ms Hartley duly emailed the claimant on

Tuesday August 15th informing her she was not proceeding with her employment. At no point before, during or after the recruitment process was Ms Hartley made aware of earlier proceedings or a COT3 between the claimant and R1.

1.5. R1's response takes the point the Tribunal has no jurisdiction in the contract claim. As Ms Brewis fairly accepted not only does it have jurisdiction in the post termination victimisation claim but there are no grounds to consider strike out or a deposit order. Rule 37 of the Rules permits strike out if a claim *" has no reasonable prospect of success"* but that standard is high . Lady Smith said in Balls v Downham Market High School and College [2011] IRLR 217 *: "I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short a high test. There must be no reasonable prospects***."** Lord Justice Clerk said in Tayside Public Transport v Reilly [2012] IRLR 755, para 30: *Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances.* Wilkie J. in Sharma-v-New College Nottingham UKEAT/0287/11 said even the little reasonable prospect test should rarely be satisfied where there is a factual dispute.

1.6. The main factual dispute will be that R1 accepts the reference given was not what it should have been but asserts this was due to a mistake made by an employee during the absence of Joanne Wood and Victoria Cowan the HR officer on annual leave , whereas the claimant avers a defective reference was given out of spite.

2. The withdrawals and My Conclusions

2.1. I explained to the claimant and her husband what could happen under Rules 51 and 52 of the Rules which provide

51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

2.2. The claim of breach of contract in the County Court would have none of the problems it has before the Tribunal. Moreover, the County Court could deal with a claim of negligence in the provision of the reference as held in 1994 by the House of Lords in Spring-v-Guardian Assurance. The limitation period for issuing is six years from the breach. I gave the claimant and her husband time to consider the position . They then informed me they wished to withdraw the breach of contract claim and

bring it later in the County Court. I am satisfied there would be legitimate reason for doing so. If the claimant succeeds in her EqA claim it is likely she will not need to do so , but if she fails , she might. Therefore, that claim will not be dismissed.

2.3. At the time the claimant presented the claim against R2 she could not have known what Ms Hartley would say. From the claimant's point of view R2 having offered her a job simply withdrew that offer. I explained in layman's terms that any direct discrimination or victimisation claim involves deciding the "reason why" an individual acted as they did. What a person does not know cannot be their reason for doing anything. In a case where one person , motivated by a claimant's protected act, gives wrong information to another who is not so motivated but in reliance on the information acts to the detriment of the claimant, it is not possible to add the former's motivation to the latter's act so as to affix liability to the latter, even where both are employed by the same employer (CLFIS UK Ltd-v-Reynolds). The claimant and her husband took time to consider the position . They then informed me they wished to withdraw but may want to have Ms Hartley give evidence for the claimant . I said they could apply for a witness order when a trial date had been fixed.

2.4. Mr Gbefa asked if Joanne Wood, Victoria Cowan and Andrew Chandler could be added as respondents. Rule 34 would permit that without Early Concilaition being undertaken with them . However, they would have to be served and given 28 days to respond. The effect would be to delay progress to trial . The claimant did not want that. Also unless there is concern about the solvency of R1 there is little point. The claimant did not pursue this application.

2.5 Mr Buckle made a costs application which I rejected without having to hear from the claimant. Rule 76 says a Tribunal may make a costs order .., and shall consider whether to do so, where it considers a party has acted
unreasonably in either the **bringing** of the proceedings (or part) or **the way that the proceedings have been conducted**; or any claim .. had **no reasonable prospect of success**.

2.6. The Court of Appeal and EAT have said costs orders in the Employment Tribunal: are exceptional and the party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 If a party allows preparations for the hearing to go on too long before abandoning an untenable case that party may be liable for costs. However, I must consider whether the claimant has brought or conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable, see McPherson v BNP Paribas (London Branch) 2004 ICR 1398, In National Oilwell Varco (UK) Ltd v Van de Ruit EATS 0006/14 in which McPherson was cited a claimant had not acted unreasonably in withdrawing his claim on the day prior to a preliminary hearing .

2.7. In my judgment, the claimant had every reason to name R2 initially. Mr Buckle provided a copy of an email sent to the claimant warning her he would apply for costs if she did not withdraw against R2 . Mr Buckle will doubtless have told her Ms Hartley's statement meant she was unlikely to succeed , but that is what any representative would say . When I, from a position of neutrality, pointed out the problems with the case against R2 , the claimant did exactly what she should . To penalise her with a costs order would be wrong.

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T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 28th FEBRUARY 2018