EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4111910/2018

Preliminary Hearing Held at Inverness on 8 February 2019

Employment Judge: Mr A Kemp (sitting alone)

Mrs J Henry	**Claimant** **Represented by** **Ms J Redpath** **Solicitor**
Highland Health Board	**Respondent** **Represented by** **Ms L Gallagher** **Solicitor**

JUDGMENT

The Tribunal:

(i) dismisses the claim as to stigma damages on withdrawal under Rule 52 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

(ii) Finds that the Tribunal has jurisdiction to consider the claim for breach of contract

(iii) Refuses the application for strike out of the claim for breach of contract under Rule 37 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

(iv) Refuses the Claimant's application to amend so far as that sought to introduce a new claim under section 47E of the Employment Rights Act 1996, but allows it in so far as it provided further specification of the claims for constructive dismissal and breach of contract.

REASONS

1. The matters to be addressed at this Preliminary Hearing were set out in a letter from the Tribunal dated 30 November 2018, and included matters of jurisdiction, an application for strike out, and other issues as to case management, including an application to amend.

Amendment

2. The Claimant sought to amend to add a claim under section 47E of the Employment Rights Act 1996 ("the Act"). That was opposed by the Respondents. The Respondents' solicitor had helpfully prepared a full written submission.

3. The Claimant's solicitor explained that the Claimant was not a disabled person under the Equality Act 2010 but had had memory problems following an accident. She believed that she had made an application for flexible working but whether that was purely orally, or was in writing, was not clear. The application was made in the context of a phased return to work after the accident and in or about April 2017.

4. The terms of the Rule with regard to case management, at Rule 29, which provide for a wide discretion, are considered subject to the overriding objective found in Rule 2 at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. Rule 2 states as follows:

"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

5. I considered the submissions made by both parties, but was satisfied that it was appropriate to refuse the application to amend. The principles for considering amendment were explained in the well-known case of ***Selkent Bus Company Limited v Moore [1996] IRLR 661***. It appeared to me that all of the issues raised by Ms Gallagher with regard to the application to amend to introduce a new claim were correct.

6. Fundamentally however it appeared to me firstly that there was no sufficient explanation for the timing of making the application to amend, which was well outwith the period for doing so timeously. The onus of proving that presentation in time was not reasonably practicable rested on the Claimant. In ***Asda Stores Ltd v Kauser EAT 0165/07***, the EAT stated that "the relevant test is not simply a matter of looking at what was possible but to ask whether,

on the facts of the case as found, it was reasonable to expect that which was possible to have been done" (paragraph 17). That is not determinative of itself, but it is a factor of some importance in the assessment.

7. There was no sufficient explanation for why that had not been done much earlier, when a solicitor was acting and when steps could have been taken to obtain any further information required.

8. Secondly the claim in any event was one that I considered had no reasonable prospects of success. In order to fall within section 47E the application must accord with the terms of section 80F of the 1996 Act. That requires it to be in writing, and state specifically that it is made under that provision, amongst other requirements. It would I consider be necessary for the Claimant to plead that she did make such an application, and when she did so, in order to found the basis for a claim under 47E. That has not been done. In any event, Ms Gallagher explained that the Respondents had no record of any such claim, and given the procedures that follow such an application being made, set out in section 80G, and the absence of such steps being taken at least as pled, that was a further factor against the Claimant. In addition, there was no indication orally of any such claim meeting the test having been made which was put forward by Ms Redpath. As it required to be in writing one would expect a Claimant to be able to produce it, or at least refer to it..

9. It appeared to me that there was no reasonable prospect of the Claimant being able to prove such requirements being met even if there was a further amendment to add the missing essential information, and that was a factor strongly against allowing that amendment.

10. I considered having regard to the overriding objective and the case law, all of which was set out properly and fully in the Respondents written submission, that it was appropriate to refuse the application to amend in so far as it sought to introduce a new claim under section 47E of the Act.

11. Ms Redpath provided further clarification of the claim for constructive dismissal, in particular the final straw relied upon being the decision to withdraw the right to appeal, which was communicated by a letter the date of which she did not then have to hand. Mrs Gallagher accepted that that provided the specification she sought. Ms Redpath also confirmed that the same facts were relied on for the claim of breach of contract, with it being alleged that there was a repudiatory breach by the Respondent, which the Claimant accepted to bring the contract to an end. In so far as that additional specification was an application to amend, I consider it appropriate to allow it.

Stigma Damages

12. The Claimant initially sought to pursue as a separate head of Claim one for stigma damages. This was withdrawn by the Claimant's solicitor at the Preliminary Hearing on 8 February 2019 and has been struck out accordingly. The matter is further referred to in the Note following the case management aspects of the Claim held on the same date, which is of even date with this Judgment.

Breach of contract - jurisdiction.

13. The second issue addressed in respect of jurisdiction was in relation to a claim of breach of contract. Ms Redpath for the Claimant confirmed that that was set out in the pleadings, which had been amended to add further specification. She confirmed that the claim was quantified at the notice to which the Claimant was entitled. She confirmed that the same facts were relied upon as those for the constructive dismissal claim. In that connection, she confirmed that the last straw on which the Claimant relied, which was argued to amount to a repudiatory breach, was a letter from the Respondent which stated that there was no right of appeal, and that that had earlier been offered in error. The precise date of that letter was not available at the time of the hearing before me, but Ms Gallagher for the Respondent was content with that confirmation. Ms Gallagher did argue however that there could not

be double recovery, that as the same facts were engaged, and in accordance with the overriding objective, the claim for breach of contract should be struck out as, in essence, duplication.

14. I considered that the Tribunal did have jurisdiction to consider the claim, as it fell within section 3 of the Employment Tribunals Act 1996 and the Employment Tribunals (Extension of Jurisdiction) Order 1994. It was a claim that arose on termination.

Breach of contract - Strike out

15. I then considered the application to strike out the claim under Rule 37. It provides as follows:

> "**37 Striking out**
>
> (1) 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 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 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 hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

16. In doing so I also had regard to the overriding objective. The basis of the application was that there was duplication between the two claims, which does not appear in terms within Rule 37, where there is reference to there being no reasonable prospects of success. If there could only be exactly the same outcome , there might be an argument that success on the alternative claim had no reasonable prospects.

17. I did not consider that striking out the breach of contract claim was appropriate. It is possible that there may be duplication between the two claims, and there cannot be double recovery, but it is not at this stage clear whether or not that will be so. The claim of breach of contract It is not precisely the same claim the one for constructive dismissal. It is possible that a claim for constructive dismissal may fail, for example if the decision was one a reasonable employer could have taken such that it may be a breach of contract but not an unfair dismissal under section 98(4) of the Employment Rights Act 1996, or that the Tribunal hearing matters may make an award for

breach of contract independently of that for any constructive dismissal, particularly if the limit on a compensatory award is a consideration.

18. The Tribunal may of course not do either of those things, but in light of that as a possibility it did not appear to me to be appropriate to strike out the breach of contract claim at this stage, as it could not be said that the claim had no reasonable prospects of success.

19. I therefore hold that there is jurisdiction for the claim in respect of breach of contract and that it should not be struck out.

Employment Judge: **Alexander Kemp**
Date of Judgment: **04 April 2019**
Entered in register: **08 April 2019**
and copied to parties