EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss K Sawyer	**AND**	(1) Cwmfelin Social Club (2) Ken Hillier (3) Elizabeth Diamond

EMPLOYMENT JUDGE Mr N W Beard (Sitting Alone)

HELD AT Swansea **ON** 4 June 2019

Representation:

Claimant: Mr L Welsh (Consultant)
Respondent: Appearance by Written Submissions

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim form was presented on 1 January 2019 within the time limits established by statute.

2. There is no basis for striking out the claimant's claims as having no reasonable prospect of success.

3. There is no basis for ordering a deposit in respect of the claimant's claims as having little reasonable prospect of success.

REASONS

Preliminaries

1. This preliminary hearing was ordered by Employment Judge Povey who set out that the issues to be resolved were: (1) whether the claimant's claims have been brought in time (2) if the answer to the first question is in the

affirmative whether time should be extended to present the claims; and if the claims are in time (3) whether any claim should be struck out or the claimant made to pay a deposit before continuing with the claim.

2. I am required to analyse when the claimant's claim was presented. Thereafter, if the claims were presented within the time limits to consider whether each or any of the claims had no or alternatively little reasonable prospects of success.

3. The respondents nor their representative attended at the appointed time. I caused the tribunal clerk to contact the representative (information had reached me of a potential delay on the M4). Telephone discussions between the representative and the clerk elicited that the failure to attend was because of an error on the part of the representative in diarising this hearing. I did not consider it appropriate to postpone the hearing on that ground alone. However, I permitted time for the respondent's representative to send written submissions to the tribunal. I informed the claimant of the circumstances and gave copies of the submission so that these may be considered.

4. I informed the claimant of the following facts, which were also communicated to the respondent before I commenced hearing the issues: that I had been an ordinary member of the respondent club from the mid 2000's until 2011. That I would, by that means have acquaintances at the respondent club which may include committee members and stewards from that period. That two close friends of mine were still members of the respondent club, Jeffrey Davies and David Locker. I invited comments from each of the parties as to whether I should preside over this preliminary hearing. Neither the claimant or the respondent's representative raised any objection.

5. I consider the law in respect of recusal is set out clearly in ***Ansar v Lloyds TSB Bank Plc & Ors [2006] EWCA Civ 1462, [2006] ICR 1565, [2007] IRLR 211*** and that the following extract provides the guidance I should apply to the facts of this case:

> *"l. The test to be applied as stated by Lord Hope in Porter v Magill 620021 2 AC 357, at para 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at para 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.*
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> *"4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: Clenae Ptv Ud v Australia & New Zealand Banking Group Ltd [l9991] VSCA 35 recited in Locabail at para 24.*

"10. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: Locabail at para 25.
"11. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (Locabail at para 25) if:
"a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or
"b. the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or,
"c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or,
"d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or,
"e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."

6. I considered that: my involvement as a member of the respondent club was a significant time in the past; that my knowledge of parties was limited to passing acquaintanceships and that my relationship with two individual members did not apparently involve me in considering any issues of credibility or reliability regarding them. This is a preliminary hearing where no evidence was to be considered but I would be considering the claimant and respondent cases on the basis of written pleadings alone. In my judgment an objective observer would not consider a risk of bias and these circumstances was not a sufficient reason for me to recuse myself from hearing this case in the absence of any objections.

The Pleaded Facts

7. On 1 January 2019 the claimant presented an ET1 claim form contending that she had suffered maternity discrimination, been unfairly dismissed and had suffered an unlawful deduction of wages. There is no dispute that the claimant has the requisite two years' service to claim unfair dismissal.

7.1. The ET1 form set out the date of the dismissal of the claimant in the relevant section as 20 August 2018. However, the respondent contends, and the claimant before me, through her representative Mr Welsh, accepted that the claimant's view that she had been constructively dismissed had not been communicated to the respondent at this date.

7.2. The information set out in the background and details of the claim section of the ET1 form indicates that the claimant was dismissed and approached ACAS in respect of early conciliation on 11 September 2018. The respondent contends that early conciliation was commenced on 6 September 2018, a date which the claimant now also accepts is correct. The claimant's position is that Mr Welsh was instructed to advise her at this date. Both parties accept that conciliation concluded on 20 October 2019.

7.3. The claimant informs me that early conciliation was put forward to ACAS on the basis of unfair dismissal along with the other claims. There is nothing in the response to indicate that this was not the case.

8. Based on those facts I conclude that the effective date of termination was 6 September 2019 when the claimant communicated her belief that she had been dismissed to the respondents via ACAS.

9. The claimant's case is that when she approached the respondents on 20 August 2018 about returning to work she was informed that work could not be guaranteed for her. The respondent's account is that the claimant asked for a change in her work on that occasion, effectively a flexible work request to her employer to which the employer replied that matters would be considered. I have been provided with no contemporaneous documentation or other evidence which supports or undermines either account of the conversation.

The Law

10. I am to apply the Employment Tribunal Rules of Procedure 2013 and in particular rules 37 and 39 which respectively (in so far as they are relevant) provide:

37. (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;

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(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.
And:
39. (1) Where at a preliminary hearing (under rule 53) the 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.
(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

11. I begin by reminding myself what function I undertake at this stage. I am required to decide that, in relation to the various statutory requirements, the claimant has either no or alternatively little reasonable prospect of establishing her claims. I take account of what was said in ***Ezsias v North Glamorgan NHS Trust*** [2007] 4 All ER 940 by Maurice Kay LJ
"(T)hat what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success"
12. That test relates to the question of whether there is "no" reasonable prospect of success it is an indication that there is a very substantial hurdle to cross for strike out to be made, indeed as is often said depriving an individual of an opportunity to present a case in full is a draconian step. In terms therefore any prospect of success which is not "merely fanciful" is sufficient for me to refuse to strike out.

13. In **Van Rensburg v Royal Borough of Kingston-upon-Thames and Ors** UKEAT/0096/07 the local authority respondent sought an order under rule 20 of Schedule 1 to the 2004 Regulations that the claimant be required to pay a deposit. This was in fact as an alternative to striking out the claims altogether under rule 18(7), the application for which was refused. Rule 20(1) is as follows:
"At a pre-hearing review if an employment judge considers that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have little prospect of success, the employment judge may make an order against a party requiring the party to pay a deposit of an amount not exceeding £500 (now £1000) *as a condition of being permitted to continue to take part in the proceedings in relation to that matter."*

Elias P, as he then was, considered the language of rule 20(1) to be clear. He saw no reason to limit the words "the matter to be determined" to legal matters only. If that had been the draughtsman's intention, the rule would, he suggested, surely have been differently formulated so as to render the intention clear. Elias P continued at paragraphs 24-27:

"24. I am reinforced in this view by the fact that there is a more draconian rule under rule 18(7)(b) which empowers a Tribunal to strike out a claim or any part of it on the grounds that it is scandalous or vexatious or has no reasonable prospect of success. In the recent decision in the Court of Appeal, North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 Maurice Kay LJ, with whose judgment Ward and Moore-Bick LJJ concurred, recognised that in principle – albeit that the cases would be very exceptional – it would be possible for a claim to be struck out pursuant to this rule even where the facts were in dispute.

25. Maurice Kay LJ gave as an example a case where the facts as asserted by the applicant were totally consistent with the undisputed contemporaneous documentation. It is also to be noted that in that case the Employment Tribunal had, prior to making the strike out order, indicated that subject to the question of means the case would be an appropriate one for a deposit to be made. No such order was in the event made because the strike-out order disposed of the case altogether. However, the Court of Appeal noted that the possibility of a deposit under rule 20 remained open and they made it plain that that would have to be considered afresh by a tribunal, but they were not 'indicating any view of the ultimate merits of this case one way or the other'. The Court was clearly acting on the assumption that the power to order a deposit could in principle be exercised where the Tribunal had doubts about the inherent likelihood of the claim succeeding.

26. Ezsias then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike-out is considered pursuant to rule 18(7). It would be very surprising that the power of the Tribunal to order the very much more limited sanction of a small deposit to not allow for a similar assessment, particularly since in each case the tribunal would be assessing the prospects of success, albeit to different standards.

27. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success founded in rule 18(7). It follows that a Tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must

have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim or response."

14. In deciding whether to order a deposit I am not dealing with matters on a balance of probabilities basis but some lower burden. In my judgment the test for a deposit requires the existence of a realistic prospect but also some additional element. That additional element in my judgment is that the claim must have a more than minimal realistic prospect of success, but no requirement that the claimant has a greater than slight prospect of success, much less an even prospect of success.

15. I am clear therefore that just because there is a dispute of evidence I am not prevented from deciding in appropriate circumstances that the case has little prospect of success. However such a case would need to be very clear cut. I am also aware of the caution I should exercise in dealing with a preliminary issue. In this regard I keep in mind the Judgment of Lord Hope in ***SCA Packaging Ltd v. Boyle*** [2009] UKHL 37; [2009] IRLR 746
It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. As Lord Scarman said in ***Tilling v Whiteman [1980] AC 1****, 25, preliminary points of law are too often treacherous short cuts. Even more so where the points to be decided are a mixture of fact and law. That the power to hold a prehearing exists is not in doubt: Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (SR 2005/150), Schedule 1, rule 18. There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in* ***National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1995] ICR 317, 323****. The essential criterion for deciding whether or not to hold a prehearing is whether, as it was put by Lindsay J in* ***CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, 1140****, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute.*

16. Section 18A of the **Employment Tribunals Act 1996**. So far as relevant, that provides:

> *"(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.*

17. The Employment Tribunals Act 1996 section 18A(1) places a requirement on the claimant to contact ACAS prior to commencing relevant proceedings.

> *A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).*

18. The original time limit for each of the claimant's claims is dealt with by a different provision, however, each provides that a claim needs to be made within three months of the act complained of. These time periods are, however, extended when the claimant engages, as she is required to do, in early conciliation (see: section 207B Employment Rights Act 1996: unfair dismissal and unlawful deduction of wages and section 140B Equality Act 2010 in respect of maternity discrimination.) However, each of those provisions are expressed in substantially the same terms and I will therefore only make reference to section 207B ERA 1996 which provides so far as is relevant:

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> *(2)In this section—*
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> *(a)Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*
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> *(b)Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*
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> *(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

> *(4)If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*
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> *(5)Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."*

19. The time limit extension period is similarly set out in statute for discrimination with the same extending periods, the so called stopped clock provisions, where the conciliation period is not taken account in considering the time limit.

Analysis

20. The claim was presented on 1 January 2019. The conciliation period began on 6 September 2018 so within the primary time limit of three months (less a day) for the claims, that is whether the effective date of termination is 20 August or 6 September 2018. Therefore, the day after day A is 7 September 2018 and day B is 20 October, this is the period not to be counted and amounts to 43 days. The claimant's complaints about events of 20 August 2019 need, based on ordinary time limits, to be presented by 19 November 2019 (and 5 December for the unfair dismissal claim). However, because of the stopped clock provisions 43 days need to be added to that date in order to obtain the correct time limits. In respect of the 20 August claims that date is 1 January 2019 and in respect of unfair dismissal is 10 January 2019. On that basis none of the claims presented are presented outside the time limits for such claims.

21. The respondent's skeleton argument starts from the proposition that the claimant is accepting that she requested flexible working. That is not correct there is a factual dispute between the parties of some significance. That dispute goes to two of the claims. There is no way of choosing between the two accounts given without hearing evidence. In my judgement there is nothing in the claimant's account of events which would allow me to say that her account of events is not factually tenable. Therefore, the claimant's claims are not fanciful in that sense. If the claimant establishes that she was told that work was not guaranteed upon a return from maternity leave, that may be enough to prove a fundamental breach of the implied term of trust and confidence. Further if the claimant establishes that whilst on maternity leave and discussing her return from maternity leave the respondent refused to guarantee the claimant's previous working pattern that may be enough to establish unfavourable treatment on the grounds of maternity within the relevant maternity period.

22. Further, in respect of unlawful deductions, the claimant states she has not been paid, the respondent contends she has. In the absence of other evidence, I cannot say that the claimant's account is fanciful or that she would only establish those facts with difficulty.

23. In those circumstances I cannot say that the claimant's claims have little reasonable prospects of success much less that she has no prospects of success. On that basis the respondent's applications are dismissed.

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Employment Judge Beard
Date: 05 June 2019

Judgment sent to Parties on

___5 June 2019____

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