EMPLOYMENT TRIBUNALS

Claimant: **Mrs. W Lambley**

Respondent: **Nottinghamshire Healthcare NHS Foundation Trust**

Heard at: **Nottingham** **On:** **Monday 24th June 2019**

Before: **Employment Judge Heap (Sitting alone)**

Representatives

Claimant: **In person**
Respondent: **Mr Islam-Choudhury - Counsel**

JUDGMENT AND DEPOSIT ORDER

1. The claim of unfair dismissal is struck out as having no reasonable prospect of success on the basis that the Claimant was not an employee within the meaning of Section 230(1) Employment Rights Act 1996 at the material time with which her complaints are concerned. She therefore lacks the standing to present that complaint.

2. The Employment Judge considers that the Claimant's allegations or arguments in respect of her complaints of whistleblowing detriment have little reasonable prospect of success. The Claimant is therefore Ordered to pay a deposit of **£15 in respect of each of those three complaints of detriment**, that being the sum of **£45 in total**, by not later than **21 days from the date that this Order is sent to the parties** as a condition of being permitted to continue to advance those allegations or arguments. If the Claimant elects to pay only part of the deposit in respect of one or more allegations, she must specify in writing which allegation(s) the payment relates to. The Judge has had regard to any information available as the Claimant's ability to pay and to comply with the Order in determining the amount of the deposits.

REASONS

BACKGROUND AND THE ISSUES

1. This Preliminary hearing followed on from a telephone Preliminary hearing conducted by my colleague, Employment Judge Evans, on 24th April 2019. Having heard from both the Claimant and the Respondent on that occasion Employment Judge Evans set down this Preliminary hearing to determine the

following matters:

1.1 Whether the Claimant's complaints were presented within the appropriate statutory time limits;

1.2 Whether the Claimant was an employee of the Respondent and, if not, whether the claim of unfair dismissal should be struck out; and

1.3 If the Claimant was an employee and the complaint of unfair dismissal was not out of time, whether a Deposit Order should be made as a condition of her being permitted to continue with it.

2. A copy of the Orders of Employment Judge Evans setting those matters out appears at page 42 of the hearing bundle and it is set against that background that I have dealt with this Preliminary hearing.

3. That is with two small exceptions. The first of those is that the Respondent has now conceded that the unfair dismissal claim was presented within the appropriate statutory time limit and therefore that is not a matter that I was required to determine today.

4. The second matter is that in the alternative to seeking a Deposit Order (in the alternative to a strike out) of the unfair dismissal claim, the Respondent also seeks a Deposit Order (again in the alternative to a strike out of those complaints) in respect of the whistleblowing detriment claims.

5. In this regard, insofar as the detriment claim is concerned the Respondent's primary argument is that those complaints have been presented outside the appropriate statutory time limits. However, they say in the alternative that a Deposit should be Ordered to be paid as on the facts, the complaints have little reasonable prospect of success. Whilst the issue of a Deposit Order in respect of the detriment complaints was not expressly set out in the Orders of Employment Judge Evans for determination today, I have dealt with the application nonetheless. The reasons for that are firstly that there are no notice provisions set out in the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which require advance notice to be given to the parties for a Deposit Order application to be considered.

6. Secondly, the issue of Deposit Orders were on the agenda in all events with regard to the unfair dismissal claim and this is not therefore a new issue for which the Claimant will not have already had the opportunity to prepare.

7. Thirdly, it is an application that clearly needs to be dealt with. It is not in accordance with the overriding objective to have their parties back on a separate occasion to deal with that when it can be otherwise dealt with fairly and efficiently today.

8. I have therefore added to the agenda today the question of whether to Order a deposit or deposits in respect of the whistleblowing detriment complaints and I have heard submissions from both parties in respect of that and the other issues for determination.

THE HEARING

9. During the course of the hearing I heard evidence from the Claimant and also from Mark Davies on behalf of the Respondent. I would not ordinarily hear evidence in a hearing to determine whether a Deposit was to be Ordered but of course that was not the sole issue to determine on this occasion as there were also jurisdictional issues as to employee status and time limits for which oral evidence was required.

10. There was, however, limited cross examination as a result of the issues before the Tribunal.

11. In addition to the witness evidence that I have heard I have also had regard to the bundle of documents prepared for the purposes of this Preliminary hearing which runs to some 258 pages.

THE LAW

12. Before reaching my conclusions in relation to the issues before me, I have had regard to the law which I am required to apply when considering the matters which Employment Judge Evans had set down for consideration.

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

13. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

14. Rule 37 provides as follows:

> *"At any stage of the proceedings, either on its own initiative or on the application of a party, the 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;*
> *(b) For non-compliance with any of these Rules or with an order of the Tribunal;*
> *(c) That it has not been actively pursued;*
> *(d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"*

15. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success on the basis that the Claimant does not have standing to bring the claim.

16. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the

chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

> *"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows 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 the 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…"*

17. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested.

18. Particular care is required where consideration is being given to the striking out of discrimination or detriment claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as fanciful and thus enjoys no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

19. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

> *"(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."*

20. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

Employee status – Section 230 Employment Rights Act 1996

21. An employee is defined by the provisions of Section 230(1) Employment Rights Act 1996. That section provides as follows:

> *"In this Act employee means an individual who has entered into or works under or where the employment has ceased, worked under a contract of employment."*

22. The starting point in considering the question of the relationship between the parties will be the terms of any written agreement between them. However, those terms should only be disregarded where they do not reflect the true agreement between the parties – in other words where the contractual terms do not reflect the actuality of the relationship (**Autoclenz v Belcher [2011] UKSC 41**).

23. It is necessary to consider whether there is an express contract of employment. If not, then in order to find an employment relationship, the Tribunal must be persuaded that there is or was an implied contract. If a Claimant submits that there was an implied contract, then the onus is upon the Claimant to establish that that a contract should be implied (**Tilson v Alstom Transport [2010] EWCA Civ 1308**).

24. A contract can be implied only if it is necessary to do so (**James v London Borough of Greenwich [2008] IRLR 358**). In order for it to be necessary to do so, it must be needed to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which that business reality and enforceable obligations would be expected to exist.

RELEVANT FINDINGS OF FACT ON EMPLOYEE STATUS

25. It is clear that the Claimant applied for work with the Respondent as a Domestic Assistant working on a bank basis. Her own application form, which starts at page 61 of the hearing bundle, makes that position clear. She was engaged thereafter on a bank registration basis. The arrangements for that engagement are set out in a Bank Registration document which starts at page 46 of the hearing bundle. The relevant parts of that bank registration document said this:

> *"**Introduction***
> *The purpose of this document is to place you on a register of individuals who may make themselves available to work on an ad hoc basis to meet a temporary need ("the Bank"). In this registration document "the Trust" means Nottinghamshire Healthcare NHS Foundation Trust.*
>
> ***1. The Bank***
>
> *1.1 The Trust is under no obligation to offer you any work and the Trust reserves the right to offer such work to other individuals registered on the Bank as it may elect in cases where the work is suitable for more than one individual. The Trust shall incur no liability to you should it fail to offer you any work.*
>
> *1.2 You are under no obligation to accept any work that is offered to you under the Bank. Any work offered to you on the Bank is temporary work only and there will be periods when no work is*

offered.

1.3 In registering on the Bank you are not and not to be treated or hold yourself out as an employee of the Trust under these terms and nothing in this document is intended to create an employment relationship between you and the Trust."

26. The question of hours of work are set out at paragraph 5.1 of the Bank Registration document and provide that:

> *"As a flexible worker you have no normal working hours"* (see page 49 of the hearing bundle).

27. The Claimant accepted during cross examination that the provisions set out above were the key terms that she worked under with the Respondent. Particularly, she accepted that she was not obliged to be offered any work by the Respondent although in practice she regularly was. She similarly accepted that she could have refused any shifts that were offered to her by the Respondent. I am therefore satisfied that they key provisions as to there being no obligation to offer or accept work as set out in the Bank Registration document reflected the reality of the arrangements for work being carried out by the Claimant.

28. There were no other requirements set out either in the Bank Registration document or the way in which the parties operated that was inconsistent with the Claimant only being required to render service when she had been offered and had specifically agreed to accept an assignment.

CONCLUSIONS

Employee Status

29. In order for there to be an employment relationship for the purposes of Section 230(1) Employment Rights Act 1996 in these circumstances it is necessary for there to be an overarching contract of employment between the parties covering periods not only when the Claimant was undertaking assignments but also when she was not. There therefore needs to be a mutuality of obligation – that is an obligation to offer work and an obligation to undertake it - and absent that, there can be no employee status.

30. As set out above, the terms of the Bank Registration document are clear and they negate any mutuality of obligation in respect of work being offered or undertaken. The Claimant herself accepts that they reflected the reality of the situation under which she performed work and thus there is no basis to disregard those terms when considering the question of employment status. Nothing else within the evidence suggested a position to the contrary.

31. As such, there is nothing before me which begins to suggest any overarching obligations or employment contract during the periods when the Claimant was not undertaking individual assignments. With that in mind, I am satisfied that there is nothing which could suggest that there was any overarching contract of employment for the duration of the relationship and, thus, the Claimant was not an employee of the Respondent within the meaning of Section 230(1) Employment Rights Act 1996. Her status was clearly one of a "worker" within the meaning of Section 230(3)(b) Employment Rights Act 1996.

32. It is clear from the provisions of Section 94 Employment Rights Act 1996 (which creates the right not to be unfairly dismissed) that a claim for unfair dismissal can only be brought by an "employee" as defined by Section 230 of that same Act. It follows that as the Claimant was not an employee of the Respondent that she lacks the standing to present a complaint of unfair dismissal and it similarly follows that that same complaint has no reasonable prospect of success such that it should be struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

Whistleblowing detriment claim

33. Turning then to the detriment claim. The first issue to consider is the Respondent's application that the detriment claim be struck out on the basis that all acts of detriment pleaded have been presented outside the applicable statutory time limits. I do not accept that argument. It is clear to me that the way in which the Claimant articulated her detriment complaints to Employment Judge Evans (as set out at page 40 of the hearing bundle) is wide enough so that the last act complained of as set out at paragraph 1.5.2 of the Judge's Orders was to include the actions of Mr. Davies of 6th July 2019. That is clear because the Claimant complains specifically, as set out by Employment Judge Evans, of no longer being offered work by the Respondent and instead of being offered work at other locations. That decision was only communicated to the Claimant by way of a letter dated 6th July 2019 (see page 98 of the hearing bundle).

34. Counsel for the Respondent has conceded today that if paragraph 1.5.2 was also taken to include the actions of Mr. Davies on 6th July then the last act of detriment would have been presented in time for the same reasons as he has conceded at the outset of the hearing today that the unfair dismissal claim was presented in time. The earlier acts may well be out of time but that will require the Tribunal to consider whether or not they form part of a series of continuing acts and that is a matter best left for consideration at the full hearing.

35. However, I turn then to consider whether there ought to be a Deposit Order in respect of those complaints of detriment. I am satisfied that there should. The matters of which the Claimant complains centre around an issue for which she was "disciplined" as a result of the loss of some keys. There is no dispute that that event did occur and the Claimant accepts as much in her original Claim Form.

36. The Claimant complains essentially as to the outcome as communicated to her on 6th July 2018 and the process leading up to that outcome. However, other than the fact that the Claimant considers the decision taken by Mr. Davies and the previous connected actions to be too harsh, she cannot point to anything to suggest any link between those matters and the protected disclosures upon which she relies. Moreover, insofar as the actions of Mr. Davies on 6th July 2018 are concerned, she is unable to say whether Mr Davies was even aware of her alleged disclosures. Mr. Davies' unchallenged position was that he was not aware of them at the time of taking his decision. If that is the case, he cannot have subjected the Claimant to detriment for having made disclosures of which he was unaware.

37. I make no finding on the knowledge point because that is a matter for the full Tribunal. However, I take into account the fact that the Claimant herself is not making out a positive case that Mr. Davies was aware of her disclosures. Indeed, she says that she does not know. The prospect of the position changing

or a link to the disclosures somehow otherwise emerging before trial and the landscape changing from that which it is today appears remote at best.

38. If that link is not there and if Mr. Davies did not know about the protected disclosures until a point after he made his decision, then the complaint about his decision has little reasonable prospect of success. If that complaint fails then the other two detriment claims are unarguably out of time. The Claimant has advanced nothing thus far to seek to establish that it was not reasonably practicable for those earlier complaints of detriment to be made and presented in time. The Claimant had legal advice from solicitors and was also a member of a large trade union during her time of employment with the Respondent.

39. Again, it seems a remote possibility that the Claimant would establish at trial that it was not reasonably practicable to present the earlier complaints in time if the complaint relating to the actions of Mr. Davies were to fail as there could of course be no continuing act with the last having been presented in time. Therefore, on that basis a Deposit Order is appropriate as all of the detriment claims have little prospect of success.

40. I have limited information as to the Claimant's means but she tells me that she has some savings, albeit that she cannot say how much. I have therefore fixed the Deposit Order at £15.00 for each of the three complaints, totalling £45.00 overall if the Claimant it to proceed with all of them. If the Claimant elects to pay only part of the deposit in respect of one or more allegations, then she must specify in writing which allegation(s) the payment relates to.

41. I consider the above to be realistic sums and ones which should not present a bar to the Claimant continuing with those complaints if she wishes to do so. I do however strongly urge her to read carefully the attached Note regarding the impact of a Deposit Order having been made and for her to seek some further legal advice.

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Employment Judge Heap

Date: 3rd September 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Case No: 2602658/2018

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3096. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: **HMCTS Finance Centre**
The Law Library
Law Courts
Small Street
Bristol
BS1 1DA

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order