EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4122594/2018 and 4103066/2019

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Held in Glasgow on 13 February 2020

Employment Judge M Kearns

10 **Mrs H**	**Claimant** **In Person**
Mrs Wendy Lambie and Mr Derek Lambie t/a Water Babies Scotland Central	**Respondents** **Represented by:** 15 **Mr W Lane –** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 Following Preliminary Hearing the Judgment of the Employment Tribunal is that:-

(1) the complaint of indirect disability discrimination by association has no reasonable prospect of success and is struck out under Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013;

(2) the Tribunal has no jurisdiction to hear the complaint of breach of contract as 25 detailed in paragraph 3 of the Reasons below and the claim fails for lack of jurisdiction;

(3) a hearing is to be fixed to determine the claimant's remaining claims. Date listing stencils will be sent out.

REASONS

30 1. The claimant was employed by the respondent from September 2014 as a swimming teacher. Having complied with the early conciliation requirements she presented two applications to the Employment Tribunal, the first on 7 November 2018, and a second on 19 March 2019. She did not resign from the respondents' employment until 31 July 2019. At the time of presentation of both ET1s she was a continuing

employee. The claimant makes claims of associative indirect disability discrimination, breach of contract, holiday pay and arrears of pay. At a Preliminary Hearing on 13 February 2020 the respondents argued that the claimant's complaints of breach of contract and associative indirect disability discrimination had no reasonable prospect of success and should be struck out under Rule 37(1)(a). They argued in the alternative that the claims had little reasonable prospect of success and that a deposit order should be made.

Issues

2. The issues before the Tribunal at this Preliminary Hearing, were:

   (i) whether the claim of associative indirect disability discrimination has no reasonable prospect of success and should be struck out;

   (ii) in the alternative whether the claim of associative indirect disability discrimination has little reasonable prospect of success; and whether a deposit order should be made.

   (iii) whether the claim of breach of contract has no reasonable prospect of success and should be struck out;

   (iv) in the alternative whether the claim of breach of contract has little reasonable prospect of success; and whether a deposit order should be made.

3. For clarity, the parts of the relevant ET1s the respondents seek to have struck out are as follows:

   (1) ET1 in case number 4122594/2018 strike out the claim for associative indirect disability discrimination as follows- :

   (a) At question 8.1 strike out the claim of disability discrimination;

   (b) At question 9.2, strike out "*I believe my request has not been treated fairly and I am bringing this case to tribunal on grounds of disability discrimination in association with my son's disability*." together with all other references to disability discrimination in the ET1 and in any further and better particulars.

(2) ET1 in case number 4103066/2019 strike out the claim for associative disability discrimination at 8.1 and any other references to this claim including in any papers apart or further and better particulars.

(3) ET1 in case number 4122594/2018 strike out the claim for breach of contract as follows:

(c) At 9.2 strike out the following head of claim, insofar as it represents a claim for breach of contract: "*In addition this would mean that I have a claim for arrears of pay as I have not been paid my full contracted hours each week. In addition, I have not received timeous annual reviews and pay increments as stated in my terms of contract and believe there are arrears of pay in this regard too."*

(4) ET1 in case number 4103066/2019 strike out the claim for breach of contract as follows:

(d) At 8.1 strike out the reference to "*Breach of Contract"*;

(e) In the paper apart referred to in 9.2 strike out the following to the extent that it represents a claim for breach of contract: "*My employer paid me (and continues to pay me) only for hours I have worked and not for the hours stipulated in my contract. At times when classes were cancelled, my employer did not pay me for these hours. As my employer stated I held a zero hours contract this appeared to be correct. I now understand this practice is not correct and believe I should have been paid for my full corrected hours each month."* together will all other references to a claim for breach of contract in any other responses, papers apart or further and better particulars.

Applicable Law

4. Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") provides so far as relevant 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 –

5 *(a) That it is scandalous or vexatious or has no reasonable prospect of success;*

(b) ………"

5. Rule 39 provides:

"***39 Deposit orders***

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any 10 *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 15 *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.

20 *(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit relates shall be struck out. …*

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order –

25 *(a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

(b) The deposit shall be paid to the other party…

Otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

Indirect disability discrimination

6. Section 19 Equality Act 2020 states:

"***19 Indirect discrimination***

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's."

Breach of contract

7. Section 3 Employment Tribunals Act 1996 ("ETA") empowers the appropriate Minister to extend the jurisdiction of the Employment Tribunal to hear a variety of breach of contract claims as may be specified in the relevant Order. (The original power was conferred by the Employment Protection (Consolidation) Act 1978. The Order now has effect as if made under section 3 ETA). Section 3 states, so far as relevant:

"***3 Power to confer further jurisdiction on [employment tribunals]***

(1) The appropriate Minister may by order provide that proceedings in respect of –

(a) Any claim to which this section applies, or

(b) …….

may, subject to such exceptions (if any) as may be so specified, be brought before an [employment tribunal].

(2) Subject to subsection (3), this section applies to –

(a) a claim for damages for breach of a contract of employment or other contract connected with employment,

(b) a claim for a sum due under such a contract, and

(c) a claim for the recovery of a sum in pursuance of any enactment relating to
5 *the terms or performance of such a contract,*

if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

(3) This section does not apply to a claim for damages, or for a sum due in respect
10 *of personal injuries."*

8. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides (so far as relevant) as follows:

"***3 Extension of jurisdiction***

Proceedings may be brought before an [employment tribunal] in respect of a claim
15 *of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –*

(a) The claim is one to which [section 3(2) Employment Tribunals Act 1996] applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

20 *(b) The claim is not one to which article 5 applies; and*

(c) The claim arises or is outstanding on the termination of the employee's employment."

9. Article 5 covers tied accommodation, intellectual property, restrictive covenants etc, and is not relevant here.

25 10. Article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides so far as relevant as follows:

"***Time within which proceedings may be brought***

Subject to articles [8A and 8B], an employment tribunal shall not entertain a complaint in respect of an employee's contract unless it is presented –

(a) within the period of three months beginning with the effective date of termination of employment of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or…"

Discussion and decision

Claim of indirect discrimination by association

11. Mr Lane acknowledged that the power to strike out a claim can only be exercised where the Tribunal is satisfied that it has no reasonable prospect of succeeding and that this is a high test to meet. However, Mr Lane's submission was that this is one such case because a claim of indirect disability discrimination by association is not competent under the Equality Act 2010 ("the EqA"). Mr Lane referred to section 19(1) of the EqA which provides that "*A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's."* It is clear, he submitted, that the relevant protected characteristic must be B's. In this case, the claimant is not, herself a disabled person under the Act. The characteristic upon which she relies is her son's.

12. Mr Lane submitted that the wording of section 19(1) does not permit "B" to rely on the protected characteristic of another person with whom B is associated. In support of his submission, Mr Lane cited two recent non-binding decisions. Firstly, a determination of the Pensions Ombudsman dated 5 February 2019 in a complaint by Mr H (PO-20991). In that decision (at paragraphs 22 to 29) the Ombudsman considered section 19 EqA and reviewed the caselaw, including the cases of CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia, C-83/14; Hainsworth v Ministry of Defence [2014] IRLR and Coleman v Attridge Law, C - 33/06. The Ombudsman's conclusion which Mr Lane adopted was that "*As UK law (including the* [EqA] *Act and the relevant caselaw) currently stands, there is no*

clearly recognised legal basis for indirect discrimination by association on the grounds of disability."

13. The Ombudsman distinguished Coleman because its ratio concerned *direct* discrimination by association, not indirect discrimination by association. With regard to CHEZ she found that its scope was currently unclear because it concerned Article 2 of the Race Directive (2000/43/EC) and not disability discrimination. She also noted that while the Supreme Court ("UKSC") in Hainsworth had acknowledged the CJEU's ruling on indirect associative discrimination in CHEZ, this had been in the context of the Race Directive, and the UKSC had not gone on to rule that indirect associative discrimination applies more generally to protected characteristics other than race. Mr Lane adopted this reasoning and also submitted that CHEZ was a case concerned with services, not employment. He argued that it should be distinguished on this ground as well as on the ground that it had been argued under the Race Directive and not disability.

14. The second recent non-binding decision to which Mr Lane referred was a decision of Aberdeen Employment Tribunal in a case Mrs CB v Andron Contract Services Ltd (case number 4112589/18). In that first instance decision it was held that indirect discrimination is not a competent claim under the EqA.

15. Mr Lane also referred to the UKSC decision in Hainsworth in which the UKSC had rejected an argument, relying on CHEZ that the concept of associative discrimination could extend to a complaint of failure to make reasonable adjustments.

16. The claimant began her submissions with the observation that solicitors and their clients frequently think claims have no reasonable prospect of success, but the test they apply is often less rigorous than the test applied by tribunals. She referred to advice on the website of Muckle LLP which correctly observes (based on case law) that discrimination claims should not be struck out except in the plainest and most obvious cases. It is also true that discrimination claims should not normally be struck out where they rest on disputed facts "unless the facts as alleged by the claimant disclose no arguable case in law or where the facts alleged by the claimant were "totally and inexplicably inconsistent with the undisputed contemporaneous documentation". The claimant referred to Cloisters' advice that in a normal case,

whatever the jurisdiction, if there is a crucial core of disputed fact, it is an error of law for a tribunal to pre-empt the determination of a full hearing by striking out the case.

17. The claimant referred to the case of Anyanwu v South Bank Student Union [2001] ICR 391 at paragraph 24 in which Lord Steyn said this: "*Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."* The claimant also quoted Lord Hope at paragraph 37: "*I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind that have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. This risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."*

18. Finally the claimant referred me to the case of Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 where, at paragraph 29 Maurice Kay LJ said this: "*it would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."*

19. The claimant's submissions are clearly correct. However, the case against her does not, at this stage rely on disputed facts. In relation to the first claim, the argument she must address is that a claim of associative indirect discrimination it is not a claim she can make under UK law as it currently stands. In relation to the second claim of breach of contract, the case against her is that the Tribunal does not have jurisdiction to consider such a claim because her circumstances do not fall within the ambit of the Extension of Jurisdiction Order.

20. With reference to Mr Lane's submission that the CHEZ case should be distinguished from these proceedings because it was concerned with the Race Directive and not

disability, the claimant submitted that protection from associative discrimination should be applicable across all protected characteristics. She argued that it was not relevant that CHEZ was a services and not an employment case, as it should be transferred across.

5 21. I considered the submissions with reference to the Coleman, CHEZ and Hainsworth decisions, the EqA and the relevant EU Directives. As Mr Lane submitted, the wording of section 19 EqA is clear. It only extends protection to the employee herself or himself. The relevant protected characteristic must be B's. In contrast, section 13 EqA, (the direct discrimination provision), provides that *"a person (A) discriminates*
10 *against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". (My emphasis). On that wording, the protected characteristic need not be B's. That is unsurprising as the EqA incorporated the jurisprudence available at the time of its drafting, including Coleman which was decided by the CJEU in July 2008. The ratio (binding rationale) of
15 Coleman concerns direct discrimination.

22. The claimant could only succeed with her claim of associative indirect discrimination if she were able to mount a successful argument that the EqA - notwithstanding its ordinary meaning - should be interpreted so as to give effect to her EU rights in accordance with the principle in Marleasing [1990] ECR 1-4135 at paragraph 8, and
20 all the cases that followed it. She cannot do so for the reasons set out by the Court of Appeal in Hainsworth v MOD and ECHR [2014] EWCA Civ 763 and upheld by the Supreme Court on appeal. Article 5 of the framework Directive (Council Directive 2000/78/EC) is the source of the claimant's EU rights. The relevant part of Article 5 is in the following terms:

25 "***Article 5***

Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case,
30 *to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a*

disproportionate burden on the employer…." (My emphasis). As can be seen from the underlined section, the article is worded in such a way that it clearly concerns provisions to be made by an employer for its disabled employees, prospective employees and trainees. Thus, Article 5 does not enable the claimant to make an argument that the EqA ought to be read so as to enable a claim of associative indirect disability discrimination. (For completeness, Article 2.2(b) also does not assist her because it refers across to Article 5).

23. The claimant also relied on the CHEZ case. Mr Lane argued that CHEZ ought to be distinguished on the grounds that it relies on the Race Directive and was a case about services and not employment. In my view, Mr Lane's submission is correct. CHEZ concerns the interpretation of Council Directive 2000/43/EC implementing the principle of equal treatment between people irrespective of racial or ethnic origin.

24. As explained at paragraph 16 of the Supreme Court's Judgment in Hainsworth, by reference to Coleman: "*The Grand Chamber accepted at para 39 that the wording of Article 5 made it apparent that it was limited to disabled employees; and at para 42 that it was so limited because its provisions either required positive discrimination or would otherwise be rendered meaningless or disproportionate and because they were specifically designed to promote the integration of disabled people into the working environment."* (My emphasis). The Court went on to say that the limited reach of Article 5 should not inhibit an expansionist and associative construction of Article 2.2(a), which is concerned with protection from direct discrimination.

25. The claimant drew my attention to the respondents' employee handbook, at paragraph A1, which states that the aim of their equal opportunities policy is: "*to ensure no job applicant, employee or worker is discriminated against either directly or indirectly"* on the grounds of *inter alia* disability. This did not seem to me to assist the claimant in relation to associative indirect discrimination. The handbook gives the rights to job applicants, employees and workers themselves. Nor did the email she referred to dated 29 June 2018 appear to be of relevance.

26. For the foregoing reasons, I have concluded that the application for strike out of the claimant's claim of indirect disability discrimination by association should be granted.

No such claim exists at this time under UK or EU law. This is not a matter of disputed facts. It is a claim that does not currently exist in law.

Claim of breach of contract

27. The claimant alleges that the respondent failed to provide her with the level of work to which she was contractually entitled. Mr Lane referred to Besong v Connex Bus (UK) Limited UKEAT/0436/04, which, he submitted, is authority for the proposition that an alleged failure to provide work (and thus wages) is appropriately categorised as a breach of contract complaint and not a complaint of unauthorised deductions from wages. Mr Lane referred to paragraph 36 of the Judgment in which the EAT said this: "*36. In the present case the parties agreed and the Tribunal found…that the Applicant was only contractually entitled to wages for shifts that he actually worked. The Applicant had never complained that he was not properly paid for the shifts that he actually worked. His complaint was always that the Respondents did not make shifts available to him to work as frequently as they should have done and on the days and at times that suited him. His complaint therefore was that, in breach of contract, he was not given a proper opportunity to work and earn wages. The failure to allow an employee to work and thereby to earn wages does not mean, in our judgment, that there is for that employee a claim for unlawful deductions from wages. Just like Mary Delaney,* [a reference to the case of Delaney v Staples in the Court of Appeal [1992] 1 AC 687 – before it went to the House of Lords] *who was unable due to her employer's breach of contract to work during her notice period, this Applicant was also unable to work because of the Respondent's breach of contract, as the Tribunal found. His claim was not therefore a claim for a debt outstanding, that is that he had not been properly paid for services rendered. Properly analysed his complaint was therefore not a complaint of unlawful deductions from his wages*." The claimant's submission in response to Mr Lane was that her claim could be brought as either a claim for breach of contract or a claim for unauthorised deductions from wages. Again, I think that Mr Lane's submission is correct and that the claim ought to be categorised as one for breach of contract. However, I do not require to make a final determination on the unauthorised deduction issue. It is only the breach of contract claim that Mr Lane seeks to have struck out. The claimant is free to argue at the final hearing that, on the evidence,

her claim is one for unauthorised deductions from wages, since her claims for unauthorised deductions are still live.

28. With regard to his application to strike out the breach of contract claim, Mr Lane's submission was that the claim has no prospect of success, because the Tribunal has no jurisdiction to hear it. He referred to Article 7(a) and (b) of the 1994 Order, set out in paragraph 10 above and the case of Capek v Lincolnshire County Council [2000] EWCA Civ 181 in which the Court of Appeal confirmed that a tribunal does not have jurisdiction to hear a breach of contract claim that is presented before the effective date of termination. Approximately half way down page 5/7 of the Bailii report supplied (page R177) Mummery LJ said this in his judgment on the legal position of the appeal and cross-appeal: "*In the context of the 1994 Order, however, there are clear indications that if, as here, there is an effective date of termination, the jurisdiction of the tribunal is confined to those cases in which the complaint is presented within the period between two fixed points of time i.e. the start date (the effective date of termination) and the end date (the end of the period of three months beginning with the contract termination date). These complaints were not presented within the period between those two points of time. They were presented before the start date."* Mr Lane submits that the same applies in the present case and that the Tribunal accordingly does not have jurisdiction to hear them.

29. The dates of presentation of the claimant's ET1s were 7 November 2018 and 19 March 2019. As the ET1 forms indicate, the claimant was a continuing employee on both those dates. It was common ground that the claimant's effective date of termination of employment was 31 July 2019, as evidenced by an email she sent to the Tribunal on 8 August 2019 (R230) containing the words: "*Please note that I submitted my resignation to Water Babies, which was accepted and my contract ended on 31st July 2019.."* Accordingly, submitted Mr Lane, the Tribunal does not have jurisdiction to hear the breach of contract complaint. He is plainly correct. The Order states in terms that: "*an employment tribunal shall not entertain a complaint in respect of an employee's contract unless it is presented –*

(a) within the period of three months beginning with the effective date of termination of employment of the contract giving rise to the claim, or

> *(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated…"*

30. In terms of the Extension of Jurisdiction Order, the claim must arise or be outstanding on the termination of the employee's employment.

31. It follows that the Tribunal has no jurisdiction to hear the claim for breach of contract in respect of hours not worked. The claim, as detailed in paragraph 3 accordingly fails for lack of jurisdiction. Strictly speaking, since the Tribunal has no jurisdiction, the appropriate disposal is to make a finding to that effect, rather than to issue a strike out order. The claim can go no further.

Employment Judge: M Kearns

Date of Judgement: 18 February 2020

Entered in Register,

Copied to Parties: 26 February 2020