



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4100946/2020 (V)**

**Held by Cloud Based Video Platform (CVP) on 14 December 2020**

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**Employment Judge Cowen**

**Ms D**  
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**Claimant**  
**Represented by**  
**Mr Edward (Advocate)**

**Scottish Ambulance Service**  
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**Respondent**  
**Represented by**  
**Mr Fletcher (Solicitor)**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1     **The Claimant's identity and that of her partner will be anonymised from**  
the papers, listing and any recording of this case from now on, under  
rule 50(3)(b) of the Employment Tribunal (Constitution and Rules of  
30     **Procedure) Regulations 2013. The Claimant will be referred to as Ms D**  
and her partner as Ms E.

2     **The Respondent's application to strike out the Claimant's claim is**  
dismissed.

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### **Introduction**

1. This was an Open Preliminary Hearing to consider strike out of part of the Claimant's case. The hearing was conducted by CVP, where both parties were represented. The Claimant by Mr Edward (Advocate) and the Respondent by Mr Fletcher (Solicitor).

2. The Tribunal received an agreed bundle of productions, skeleton argument from the Claimant and written submissions from the Respondent. Both parties addressed the Tribunal orally, although the Respondent's written submissions stood as their primary submission.

#### The nature of the hearing

3. The hearing was listed at a previous case management preliminary hearing heard by EJ Porter on 12 June 2020. At that hearing the Respondent based their request for strike out on the content of paragraph R4.2 in the agenda for case management which in response to the question "Are there any preliminary issues"; replied " *Yes. Prospects of success. The legal basis for the Claimant's pleadings. The Claimant asserts that the Respondent should not have accepted the Claimant's unambiguous resignation. It is the Respondent's position that the common law position is clear that an employer cannot refuse a resignation proffered by a Claimant. It is accepted that the Claimant sought to rescind her resignation over a month after her employment was terminated. At this point the parties had no contractual relationship.*

*The PCP suggests that the Respondent had a responsibility to undertake an OH assessment or otherwise when an employee seeks to resign. Given the Claimant resigned. in line with the termination clause in her contract of employment, the PCP is a nullity."*

4. EJ Porter's order (at paragraph 7) states "...The respondents seek strike out on the grounds articulated in R4.2 of their Agenda".

5. The parties then went on to discuss whether the matter should be dealt with in writing or at a hearing and today's CVP hearing was settled upon. Directions were then given for preparation which all parties complied with appropriately.
- 5 6. It is noted that Mr Fletcher was present and represented the Respondent on 12 June 2020 and today.

#### Preliminary Application

- 10 7. A preliminary application was raised by the Claimant to request anonymity under rule 50(3)(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, on the basis that the Claimant's mental health was a central issue to the case and matters relating to her private medical position would be revealed and her identity should therefore be protected. It was also asserted that in order to avoid identifying the Claimant, the identity of her partner should be anonymised in all court papers, listing and public record of the case. The Respondent did not object to this application.
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8. The Tribunal decided to allow the application on the basis that it gave full consideration to the principle of open justice and to the convention right on freedom of expression. It also took into account the fact that the application amounts to a request to divert from the principles of open justice and that consideration must be given not only to the rights of the parties, but to the matter of the interests of justice and the overriding objective.
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9. The Tribunal took account of the fact that the Claimant had brought the case, knowing it would be heard in public and recorded on the Tribunal register. However, the Tribunal also took into account the fact that the Claimant suffers illness, is no longer employed and therefore may wish to enter the labour market in the future and that the identity of her partner may also lead to her identity being revealed.
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10. It was therefore ordered that the name of the Claimant will be anonymised to Ms D in all further references. Her partner will be referred to as Ms E. The

parties in the hearing will refer to them as such, all Tribunal listing and records will be amended to reflect this order.

### The Facts

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11. The following facts are taken from the agreed facts provided to the Tribunal; The Claimant was employed as an ambulance care assistant from 2004/05 to her date of termination on 11 October 2019.

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12. During November 2017 the Claimant was referred to an eating disorder clinic. She had various periods of absence from work as a result of her condition, up to the end of her employment.

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13. In July 2019 she once again was absent from work as a result of her eating disorder. The referral to Occupational Health at that time refers to the Claimant requesting to leave on medical grounds. The report indicated that there was prospect for improvement and a return to work in the future. It also referred to any psychological condition as being long term in nature and *“likely to pursue a course of periodic exacerbation and periods of relative remission into the future”*.

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14. In response to this report, the Claimant attended an absence meeting on 9 September, accompanied by her Trade Union representative and it was agreed that the Respondent would pay for private treatment. It was clear to the Respondent on 9 September that the Claimant was in need of assistance with her mental health, such that the offer was made.

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15. The Claimant met with the Respondent again on 20 September 2019, she was not accompanied. She indicated that she wanted to resign. The Respondent agreed to shorten her contractual notice period from 12 weeks to 3 weeks, so her employment would end on 11 October 2019.

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16. The Claimant attended work again on 24 September to complete the paperwork to process her resignation. On the same day she was assessed by

Psychiatry where it was noted that she was drowsy and her medication was altered.

17. On 26 September the Claimant's partner emailed the Respondent. She indicated that the Claimant had been diagnosed with bipolar disorder and stated that the Claimant had resigned during a manic high.
18. The Claimant was invited to attend a meeting prior to the expiry of her notice, but was not able to attend until 4 November 2019 (after her notice period expired). A letter was sent from the Respondent summarising the meeting. The Claimant responded by requesting that her resignation be retracted. The Head of the Ambulance service wrote to the Claimant on 16 December 2019 declining to allow the Claimant to rescind her resignation.
19. The Claimant has continued to suffer mental ill health since that time and has been receiving treatment.

## The Law

### Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 r37.— 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;

#### The test for Strike out

The Tribunal must consider the Claimant's case at its highest; whilst the Tribunal can consider the merits of the case, it must not enter into a trial.

The leading authority on strike out is *Balls v Downham Market High School and College* UKEAT/0343/10/DM, which stated that the Tribunal must be careful to consider all the available material and decide if it can conclude the claim has no

reasonable prospects of success. It is not a test of whether the case is likely to fail, or could fail.

5 If the Tribunal is satisfied that there are no reasonable prospects of success, it must also consider whether, in its discretion it should therefore strike out the parts/claim.

*Anyanwu v South Bank Students Union 2001, ICR 391,HL* says that a Tribunal should not strike out unless it is obvious, as cases of discrimination are fact sensitive and require a full examination of the evidence to make a determination.

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### Special Circumstances

Where there is a resignation it should be taken at face value *Sothorn v Franks Charlesly 1981 IRLR 278, CA*. But exceptions do apply, where there are special  
15 circumstances *Willoughby v CF Capital Plc 2012 ICR 1038, CA*; The employer must undertake investigation to satisfy itself that the employee really intended to resign.

*Kwik- Fit v Lineham 1992 ICT 183, EAT* where it was said that it could be risky for an employer to accept a resignation without allowing time to elapse and then  
20 considering whether a further investigation was required.

### Submissions

20. The Respondent provided detailed written submissions which formed the core  
25 of his submission. The Claimant provided a skeleton argument which he expanded upon in oral submissions. The Respondent did respond with more detailed replies and points in relation to the ambit of the hearing.

### 30 Decision

21. The Tribunal must consider whether the Claimant has no reasonable prospect of success. In doing so, the parties agree that the issue to consider is whether

the resignation of the Claimant was valid and ought to have been accepted by the Respondent without any further investigation.

- 5 22. The Respondent asserted that in common law they cannot refuse to accept a resignation. The allegation by the Claimant therefore cannot succeed. The Respondent submitted that for them to refuse to accept the resignation the Claimant would be asserting that she did not have “capacity to resign”. The Respondent asserts that the Claimant will not be able to prove that she did not have capacity at the relevant time.
- 10 23. The Tribunal notes that there is a legal definition of “capacity” and there are consequences of entering into (or terminating) legal relationships with someone who does not meet the criteria for capacity. That in itself would require a legal argument before a Tribunal. At this stage it cannot be said with  
15 certainty that there is no prospect of success for the Claimant on that point.
- 20 24. The Claimant asserted that they do not go as far as suggesting that the Claimant did not have legal capacity at the time of the resignation, but that she was not making ‘conscious and rational decisions’. The Claimant asserted that it is an exception to the common law rule on resignation that where there are special circumstances, the employer should undertake investigation, prior to accepting the resignation. As stated by Rimer LJ in *Willoughby v CF Capital (supra)* at para 38 the purpose of the exception is to give the employee the opportunity to show that “*his mind was not in tune with his words*”.
- 25 25. Both parties directed the Tribunal to the OH referral document of July 2019 setting out that the Claimant had current mental health issues. The Respondent relies on this report to show that the Claimant had consistently and repeatedly asked about leaving her employment from July onwards. The  
30 Claimant relies on it to show that the Respondent had knowledge that the Claimant was suffering from poor mental health.
- 35 26. In order for the Tribunal to consider this point, evidence of the mental health of the Claimant at the time would need to be provided. The Claimant asserts that evidence will be available.

27. Only after having heard the evidence would the Tribunal be able to decide if the Claimant required and had the capacity, or whether conscious and rational decision-making is a separate test. Essentially the Tribunal will have to consider whether the special circumstances exception applies in this situation. To do so, it will have to consider the factual evidence at the time of the resignation. If it does, then the Claimant has some prospect of success; sufficient to warrant the progress of this claim.
28. The Respondent further asserted that the Claimant resigned in accordance with their own contract and therefore has no prospect of success. Once again, that is a matter of fact to be considered by a Tribunal, taking into account all the circumstances, including the Claimant's illness.
29. The Tribunal does not consider that there is no reasonable prospect of success (i.e that the matter should move forward to trial).
30. As to the PCP of accepting the resignation of the employee who was off work with a severe and enduring mental health condition without seeking medical advice before doing so;
31. The respondent says this claim is a nullity as this PCP did not exist. It is for the Claimant to show that it did and that it placed her at a disadvantage. That is clearly a matter which will require evidence to be brought out for the Tribunal to consider. It will be a decision of fact for the Tribunal as to what was required and whether this would have alleviated any disadvantage from the PCP. There is therefore some prospect that the Claimant may succeed, as it will turn on the evidence.
32. The Tribunal therefore considers that the claim should progress to a final hearing.
33. The Respondent asserted that the Preliminary Hearing today was in regard to all the claims. However, upon reading the notes of the PH from EJ Porter, it was clear that the Respondent mentioned only two points in the answer at R4.2



in the agenda. These are the only two points which the Tribunal has considered today.

34. The parties agreed that if the claims were to be allowed to proceed, the Tribunal should set out directions to trial (albeit with the caveat that either side could apply to vary them with reasons). An order for directions is therefore attached with this judgment.

10 Employment Judge: Sally Cowen  
Date of Judgment: 17 December 2020  
Entered in register: 23 December 2020  
and copied to parties