EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105346/20 (V)

Held on 11 June 2021

Employment Judge J M Hendry

Mr H Nesterovas	**Claimant** **In Person**
Macduff Shellfish Scotland Ltd	**Respondent** **Represented by** **Ms S Mackay** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The Strike Out application is refused.**
2. **The application for a Deposit Order is refused.**

REASONS

1. The claimant raised proceedings against his former employers Macduff Shellfish Scotland Ltd ("Macduff") on 2 October 2020 following his dismissal by the company. His claims were for unfair dismissal and disability discrimination. The disability discrimination claim was later withdrawn.

2. The respondent company opposed the remaining claim arguing that the claimant had been fairly dismissed because of his failure to attend work.

3. The respondent's lawyers lodged an application for strike-out on 18 March 2021. As the claimant did not have two years' service they argued that the Tribunal had no jurisdiction to hear an "ordinary" unfair dismissal claim and that the claim as pled had no reasonable prospects of success and should be struck out. In the alternative they argued that the Tribunal should make a deposit order.

4. The case proceeded to a CVP hearing. The Tribunal had the benefit of a bundle of documents prepared by parties (JB1-36) which parties referred in the course of their submissions.

Respondent's submissions

5. Ms Mackay at the outset reminded the Tribunal that the claimant did not have sufficient qualifying service. He founded his unfair dismissal claim on section 100 of the Employment Rights Act ("ERA"). There was no reference to section 100 in the ET1 nor was it clear in the ET1 and in the other papers what the claimant's position was, indeed, her submission was that it had altered, that there were issues of credibility arising from the claimant's position as he set it out in his ET1 and Agenda document.

6. Ms Mackay made reference to a case management discussion had taken place on 16 February. That hearing was the first occasion Mr Nesterovas had mentioned that he was founding his claim under section 100 of the Employment Rights Act. Following that hearing the respondent had lodged a formal application for strike-out.

7. In Ms Mackay's submission the case as pled does not come within the ambit of s.100. She reminded the Tribunal of the terms of the section. She then examined the e-mails, in particular the e-mail of 22 May from the claimant.

At that point he set out his position and he was asking to be put on furlough and it was the first occasion he mentioned that he lived with somebody who was considered vulnerable in relation to Covid. Mr Nesterovas confirmed that he shared the common areas of a flat namely the kitchen/bathroom etc. with someone who was shielding because of a respiratory condition.

8. Ms Mackay took the Tribunal through the history of the claimant failing to return to work and the self-isolation certificates which he appears to have obtained. His position was that he wanted to go on furlough rather than it was unsafe to return to work. There was no response from Mr Nesterovas to the detailed e-mail from the respondent setting out the precautions they had taken to allow employees to return to work. There was no reference to health and safety as such in the correspondence and there was no clear factual basis to bring the claim within the ambit of the section.

9. Ms Mackay also made reference to the claimant's Agenda document. She indicated that at that point the claim was for direct discrimination in relation to disability was being made and seeking furlough payments. The disability in question being his Coronavirus symptoms. The claimant later accepted they were insufficient to found a claim for disability discrimination. There was, she pointed out, reference to his flatmate receiving a "shielding letter" but that letter has never been produced.

10. In relation to the e-mail exchange (JBp132) there was, in her view, a deliberate misrepresentation because from the Agenda the claimant alleges that he sent the shielding letter to the respondent but the correspondence shows that it was not sent only letters from NHS Scotland about self-isolation. Ms Mackay then took the Tribunal through the appeal process.

11. In the submission of the respondent's age s.100 did not help the claimant on the basis of what he has currently pled. At highest he cannot succeed. The respondent took steps to ensure that working arrangements were compliant with Covid advice. If the Tribunal was not with the respondent's position then she sought a deposit order as the claim had little prospects of success. She

made reference to the case Employment Tribunal case of ***Mr D Rodgers v Leeds Laser Cutting Ltd: 1803829/2020*** which was one of the first cases reported after "lockdown" and which considered these issues.

12. In response Mr Nesterovas indicated that he had considerable concerns about Coronavirus and the steps needed to combat it. He suffered from asthma but it was not serious enough for him to have to shield. He reminded the Tribunal that at the time it wasn't particularly clear what the science around Covid was or what steps should be taken by employers. He shared a house with someone he knew had respiratory problems who had received a shielding letter which was shown to him. In addition, he felt unwell with what he thought might be Covid systems and these symptoms persisted for some weeks. He was told by NHS 24 to self-isolate. He had tried to pass confirmation of the advice to the employers but there may have been internet problems that delayed the delivery of the documents.

13. He continued that he did not think that the employers really knew what the safe arrangements should be at the time and in his opinion it would be impossible to stay distanced in a factory environment. (He has not pled why this is so and he should give the respondent fair notice of this position). Covid was, in his estimation, (and in the view of the Government at the time) a serious and immediate threat to his life and to the health of his flat mate and he came within the protection of the section.

14. Mr Nesterovas indicated that the isolation notes from NHS 24 were in any event finally received by the respondent's managers and this gave them an opportunity to look again at the decision that they had made to dismiss him. He felt that he had done everything possible as an employee to keep his employers up-to-date. It was not his fault that they did not receive the isolation notes. He has now looked into the legal position and his view is that he was unfairly dismissed and entitled to rely on s. 100 of the Employment Rights Act. Mr Nesterovas had prepared a short statement which he then read over (the points made there are captured above). In his submission he

had behaved properly by self-isolating because of his own symptoms and not returning to work because of the danger to his flat mate.

15. Ms Mackay's position was that the claimant could in any event have gone and been tested for Covid. Mr Nesterovas' position was that the tests were not effective at that time and the science of ''Covid'' at this early point in the Pandemic was by no means clearcut.

Discussion and Decision

16. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that:

"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;…..

(c) for non-compliance with any of these Rules or with an order of the Tribunal …"

17. In applying the Rules the Tribunal must have regard to the overriding objective in Rule 2:

"*Overriding objective*

2. 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."

18. It has been recognised that striking out is a draconian power that must be exercised carefully. If exercised it would prevent a party from having their

claim determined by a Tribunal. The legal principles applicable in relation to the striking out of discrimination complaints pursuant to this Rule are well-established. In the House of Lords case of **Anyanwu & Ano v South Bank Student's Union and Ano 2001 ICR 391**, Lord Steyn said as follows:

"24. … *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. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university*."

At paragraph 39 in the judgment of Lord Hope of Craighead, said as follows:

"Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail."

19. In **Ezsias v North Glamorgan NHS Trust 2017 ICR 1126,CA** ,a case referred to by both sides, the Court of Appeal was considering a case involving public interest disclosure and held that a claim should not ordinarily be struck out where there was a:

"*29. … crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. … 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 applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. …"*

20. I recognise that this is not a discrimination claim but similar public interest issues arise from the protections afforded by the section especially in the context of the Pandemic.

21. In the more recent case of **Ahir v British Airways plc [2017] EWCA Civ 1392** , Underhill LJ said as follows:

"*16. … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary*

to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be ' little reasonable prospect of success'."

22. The Covid Pandemic has resulted in the terms of section 100 of the Employment rights Act 1996 ('ERA') being considered more frequently than in the past. It provides:

"***100 Health and safety cases.***

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a)…..

(b)….

(c) …..

(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e)in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

23. The respondent's agent referred me to the Judgement of Employment Judge Anderson in the case of ***D Rodgers v Leeds Laser Cutting Ltd***. I noted that he reached various conclusions essentially that the employee could not rely on the protection afforded by the section after hearing evidence presumably

at a full hearing. That is not the situation here. I quote the Judgement at a little length as it overs many of the issues raised in the present case.

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61. Mr Gidney submitted that the provisions within s100(1)(d) and (e) were not designed for the Covid pandemic and the claim was an attempt by the Claimant to 'shoehorn' his situation into these provisions, to suit him, in the context of the pandemic. I accept that when drafted, the Act was not specifically designed for the Covid pandemic – how could it have been? However, I reject the suggestion that s100(1)(d) and (e) cannot apply to situations arising from the pandemic, as a matter of principle. It seems to me that every case will need to be considered on its facts and merits.
62. The Claimant refers to the Secretary of State's declaration of 10 February 2020 under regulation 3(1) of the Health Protection (Coronavirus) Regulations 2020 that Covid-19 1803829/2020 poses a serious and imminent threat to public health (emphasis added). However, I consider that the fact that the virus has been described in those terms does not, of itself, satisfy this part of the statutory test. If it did, it seems to me any employee or worker could simply 'down tools' on the basis that the virus is circulating in society.
63. In her closing submissions, Miss Dannreuther submitted that even if there had there been measures in place at the time, there was still a reasonable belief held by the Claimant of a serious and imminent danger, which he could not avert. I am not persuaded that this is a correct interpretation of the provisions. To accept this submission would essentially be to accept that even with safety precautions in place, the very existence of the virus creates circumstances of serious and imminent danger, which cannot be averted. This could lead to any employee relying on s100(d) or (e) to refuse to work in any circumstances simply by virtue of the pandemic.
64. In my judgment, whilst conditions pertaining to Covid-19 could potentially amount to circumstances of serious and imminent danger in principle, I do not consider that they did so in this case. I do not consider that the Claimant reasonably believed that the circumstances were of serious and imminent danger, for the reasons set out above.
65. When considering s100(1)(d), I conclude the Claimant's decision to stay off work was not directly linked to his working conditions I find that this is not a case where the claimant refused to return to his place of work, or any dangerous part of his place of work due to the conditions in that environment; he refused to return to his place of work until the national lockdown was over. I cannot conclude that the decision to absent himself, regardless of what the situation might be at the workplace, until a national change was made, can lie at the door of the Respondent."

24. It can be noted that the Judge came to various factual findings disentitling the claimant from relying on the section. He wrote observing that every case will need to be considered on its facts and merits. In particular, he found that the claimant's decision to stay off work was not directly linked to his working

conditions. That is one of the critical issues here. In this case, while I accept that there are grounds to question the reason for the claimant's actions and explore his motivation in the context of the emails written at the time it would still be open to a Tribunal to find that the principal reason he stayed off work related to either concerns over his own health or that of his flatmate. In short he might be believed. The claimant would be entitled to produce the letter he refers to, if it can found, (or obtain a copy) or to perhaps lead evidence from his flatmate about his respiratory condition.

25. Many of the matters raised by Ms Mackay are matters of inference attacking the claimant's credibility. It may well be that the claimant can prove to a Tribunal's satisfaction that he had a flatmate who was shielding and that his concerns for himself or his flatmate are sufficient to bring him within the terms of the section. Her position was that the claimant in effect wanted to stay off work on furlough and still to be paid most of his salary and that the ''Covid'' or Health and Safety reasons are a smokescreen. Wanting to go on furlough is not necessarily inconsistent with having fears for returning to work. I cannot determine the truth of either side's position at this stage and it would be inappropriate to do so without evidence on these matters. I am not satisfied that in these circumstances the claimant could be said to have no reasonable prospects of success. That is a high hurdle. Much will depend on whether he can convince a Tribunal of his position whilst facing probing questions about the matters raised by Ms McKay.

26. I turned to the second part of the test which applies if there is an application for a Deposit Order. I recognise the importance of the application to the respondent who believes that they can demonstrate that the claimant is not a credible or reliable witness. There are certainly a number of questions that require clearer answers such as why the claimant did not query the distancing arrangements if he thought they were inadequate, whether the shielding letter exits, why he did not take a Covid test, whether he can show that he sent emails with the NHS advice to self- isolate and so on. Looking at the matter in the round I believe the claimant faces some difficult obstacles but those

obstacles relate to whether he is believed and I cannot say, until evidence is heard and assessed that he will be unable to overcome them and that he has little prospects of success.

27. Finally, I would caution the claimant that if the Tribunal hearing the case comes to the view that he has been less than candid about any of these matters then he will, from the attitude of the respondent company, reflected in their solicitor's submissions, almost certainly face an application for legal expenses (costs). Whether the rule on expenses is ultimately engaged and whether an award should be made will, of course, be a matter for the good judgment of the Tribunal hearing the case.

JM Hendry

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Employment Judge

24th of June 2021

Dated

24th of June 2021

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Date sent to parties