# EMPLOYMENT TRIBUNALS

| Claimant | | Respondent |
|---|---|---|
| **MR DAVID DAWES** | **V** | **THE ROYAL COLLEGE OF NURSING OF THE UNITED KINGDOM** |

**Heard at**: London Central ET (by video)

**On**: 25 & 26 January 2023

**Before:** Employment Judge P Klimov (sitting alone)

**Representation:**

**For the Claimant:** in person

**For the Respondent:** Mr T Coghlin KC, counsel

# JUDGMENT

1. The Claimant's claim for automatically unfair dismissal under section 103A of the Employment Rights Act 1996 ("**ERA**") is struck out as having no reasonable prospect of success.

2. This judgment does not affect the Claimant's other complaints in the proceedings, which shall be subject to a separate judgment.

# REASONS

*The Background*

1. By claim forms dated 18 February 2022 and 20 May 2022 the Claimant brought complaints of a "whistleblowing" detriment under s.47B ERA, unjustifiable discipline under s.64 and s.65 Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**"), and for automatically unfair dismissal under s.103A ERA.

2. The Respondent denies all the claims and applied to the Tribunal to have the Claimant's claims struck out on various grounds, including that the Claimant was not an employee of the respondent, and as such does not have the right to bring a claim for automatically unfair dismissal under s.103A ERA.

3. This open preliminary hearing was to consider the Respondent's strike out application. At the end of the hearing, I gave an extempore judgment on the Respondent's strike out application with respect to the Claimant's s.103A ERA claim, granting the application, and decided to reserve my judgment on the remaining issues in the Respondent's application. This is because, unlike s. 103A ERA issue, these are much more complex and require more time for proper determination.

4. Also, this was to assist the parties with the progress of the parallel proceedings in front of the Trade Union Certification Officer ("**TUCO**"), which are due to be heard in two weeks' time, and which, I am told, were stayed last autumn pending the Tribunal's determination of the issues of the Claimant's employment status, as it appears this has a bearing on the TUCO's jurisdiction to entertain the Claimant's application under s.108A TULRCA. There was no objection by either party for me to deal with the Respondent's application in that way.

*The Claimant's s.103A ERA claim*

5. The Claimant accepts that at the time of the alleged dismissal in November – December 2021 he was not an employee of the Respondent. In fact, he accepts that he was not an employee of the Respondent from 13 July 2021, when he stood down as the Chair of Council. The Claimant's employment status before 13 July 2021 is in dispute. For the purposes of the strike out application the Respondent does not contest that the Claimant comes within the extended definition of "worker" as described in *Gilham v Ministry of Justice* [2019] ICR 1655.

6. The Claimant, however, argues that when he stood down as the Chair of Council, and, on his own case, ceased to be an employee of the Respondent, he was anticipating returning to that role following the Respondent's disciplinary investigation into his conduct.

7. He argues that when he was excluded from the nomination process for the then vacant Chair role (which process closed on 22 November 2021) or, in the alternative, when his fixed term of the office would have ordinarily expired (on 31 December 2021) had he not stood down from the role earlier, on 13 July 2021, that was in effect dismissal from the Chair role. He claims that the dismissal was automatically unfair because the reason for the dismissal was his "blowing the whistle" on various issues, which are the subject matter of his whistleblowing detriment and unjustified discipline claims in these proceedings.

*The Law*

8. Section 94(1) ERA states:
   **"*94.— The right.***
   *(1) An employee has the right not to be unfairly dismissed by his employer.*"

9. Section 103A ERA states:
   **"*103A Protected disclosure***
   *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 the employee made a protected disclosure*."

10. Therefore, to bring a claim for automatically unfair dismissal under s.103A, one must be an employee within the meaning of s. 230(1) ERA, i.e.,

    "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*".

11. If one falls within the definition of the so-called "limb b worker" under s.230(3)(b) ERA or within the extended definition of "worker" under ***Gilham***, this still does not give the individual the right not to be unfairly dismissed under s.94ERA and consequently for such dismissal to be regarded as unfair under s.103A ERA. This, of course, does not mean that the dismissal cannot be claimed as a detriment under s.47B ERA, and if such claim succeeds, the "worker" can recover losses flowing from the dismissal, but that is a different claim to a s.103A ERA claim.

12. Rule 37 of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**") states:

"*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 … has no reasonable prospect of success…*"

13. The key principles derived from the case law with respect to the Tribunal's exercise of its strike out powers can be summaries as follows:

    (i) A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: (see, for example, *Tayside Public Transport Company Limited v Reilly* [2012] IRLR 755 at paragraph 30).

    (ii) Additional caution must be exercised by tribunals when dealing with strike out applications of discrimination and "whistleblowing" claims, as such cases are generally fact-sensitive and require full examination of all relevant facts to make a proper determination (see, *Anyanwu v South Bank Student Union* [2001] ICR 391, HL and *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, CA).

    (iii) The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "*has a realistic as opposed to a fanciful prospect of success*" (see, for example, paragraph 26 in the ***Ezsias*** case).

    (iv) The tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the tribunal may be able to come to a clear view (see, for example, paragraph 29 of ***Ezsias***).

    (v) Subject to this point, the tribunal must take the case of the respondent to the application to strike out (in the present case the Claimant's claim) at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.

    (vi) The fact that a given ground for striking out is established gives the tribunal a discretion to do so – it means that it "may" do so. The concern of the tribunal in exercising this discretion is to do justice between the parties in accordance with the overriding objective under Rule 2 of the ET Rules. Therefore, the tribunal should not normally

strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleadings. It would normally consider the pleadings and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed (see, *Soo Kim v Yong* [2011] EWHC 1781).

(vii) Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in *Hassan v Tesco Stores Limited* UKEAT/0098/16 and *Mbuisa v Cygnet Healthcare Limited* UKEAT/0109/18).

*Analysis and Conclusion*

14. The Claimant accepts that he was not an employee of the Respondent at the time of the alleged dismissal on 22 November 2021 or, in the alternative, on 31 December 2021. That admission is fatal to his claim under s.103A ERA, because he simply does not have the right not to be unfairly dismissed, and the Tribunal does not have the jurisdiction to consider his s.103A ERA claim.

15. I note that there is an apparent tension between the Claimant saying that he was dismissed from the role of the Chair of Council (which he claims gave him the status of an employee of the Respondent) on 22 November 2021 or, in the alternative, on 31 December 2021, and him accepting that at neither of those two dates he was an employee of the Respondent, and indeed, accepting that he was not an employee of the Respondent from 13 July 2021.

16. However, that is the Claimant's case. I accept that the Claimant is a litigant in person, albeit with some experience and more than the average lay person's knowledge of employment law. Nevertheless, having explained the relevant legal principles to the Claimant and having clarified with the Claimant that he understood the implication of him not being an employee of the Respondent at the time of the alleged dismissal, I am confident to proceed on the basis that it is indeed the Claimant's pleaded and confirmed case that he was not an employee of the Respondent from 13 July 2021.

17. As I stated above, the Claimant's acceptance that he was not an employee of the Respondent from 13 July 2021 is fatal to his claim under s.103A ERA. Therefore, taking the Claimant's s.103A ERA claim at its highest and applying the aforementioned legal principles, I am satisfied that the Claimant's claim has no reasonable prospect of success, and it will be in the interests of justice and in accordance with the overriding objective to strike it out.

18. For the sake of completeness, I must mention that the Claimant does not claim that he was automatically unfairly dismissed on before 13 July 2021,

when on his case he was pressured to stand down as the Chair of Council. In any event, that was before any of the alleged protected disclosures, which happened in late August and early/mid- September 2021.

**Employment Judge Klimov**

26 January 2023

Sent to the parties on:

26/01/2023

For the Tribunals Office

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.