EMPLOYMENT TRIBUNALS

Claimant: **Ms Abiola John**

Respondent: **B. Braun Medical Ltd**

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (by video link – "CVP") On**:** **06 January 2023**

Before: Employment Judge R S Drake (sitting alone)

Appearances
For the Claimant: Mr L Robert-Ogilvie (Pro Bono Representative)
For the Respondent: Mr S Craig (Solicitor)

JUDGMENT

1. The Claimant's claims of unfair dismissal and breach of contract (in not having received pay in respect of notice) and non-payment of wages are dismissed in accordance with paragraph (a) Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), on the grounds that the claims have no reasonable prospect of success on the basis of the pleadings, arguments and the materials produced to me today.

Reasons

2. I heard detailed argument from both sides representatives after seeking to clarify the date of termination of employment relied upon by the Claimant. I refer hereafter to pages and paragraphs in documents produced to me in a Bundle supplied by the Respondent for this hearing, the content of which I note having been accepted by the Claimant's representative, albeit he did not

necessarily accept what might reasonably be inferred from many of the contents. I recognise and applaud the efforts of both representatives and commend their earnest persuasive efforts. I reserved this Judgment so as to consult the authorities cited and to deliberate carefully.

Findings

3. The claim as pleaded is perplexing. In the ET1 the Claimant cites 18 February 2022 as the date of termination of employment by the Respondent and then goes on apparently revive a claim based on alleged breach of section 100(1)(a) of the Employment Rights Act 1996 as amended ("ERA"). In terms, this claim was that the Claimant was dismissed because she had carried out activities in connection with preventing or reducing risks to health and safety at work. I find that on the pleadings she had not stated that the Respondent had designated her to carry out such activities, so that to that extent because designation is a key element of the Section, such a claim was already doomed to fail ab initio.

4. The heart of the claim as eventually pleaded (after seeking to revive elements of the alleged S100 dismissal) is alleged constructive unfair dismissal in that the Claimant says she resigned on 30 May 2022 in response to breach of contract, that breach being (inter alia - P9 ET1 para 8.2.1):-

    4.1 Relying on "unsustainable evidence" and "factually incorrect evidence" in investigative and disciplinary processes, "irrational/disproportionate decision making," and "having no foundation for deciding to dismiss" – (P9 – ET`1 para 8.2 1); This all relates to the alleged S100 dismissal;

    4.2 Not being listened to at any stage – her arguments being said to "fall on deaf ears" – (P14 – ET1 para 15.7) – Again, all relating to the alleged S100 dismissal;

    4.3 Express dismissal on 18 February for alleged gross misconduct;

    4.4 Absence of a policy requiring the Respondent's staff to be vaccinated before being permitted or allowed to carry out care duties at care Homes – this despite clear and current Regulations in force at the relevant time requiring such vaccination and it being apparent (P9 – ET1 para 8.4) that the Claimant had allowed an unvaccinated staff member to act in breach of the Regulations; Again, all relating to the alleged S100 dismissal;

    4.5 After dismissing an appeal but taking account of mitigation, then re-engaging (as distinct from reinstating) the Claimant, and doing so without assurance as to preservation of continuity of service, such re-engagement being by way of demotion entailing reduction in pay;

5. I noted that after all the above, the Claimant's ET1 is dratted so as to then seek to argue dismissal was automatically unfair under Section 100 ERA on

"Health and safety Grounds (P14 – ET1 para 15 .8 et seq), and that though the Claimant had accepted re-engagement on terms made known to her before acceptance, she had later reconsidered and sought to revive the automatic unfair dismissal argument. The Claimant also seeks to claim that because she felt it necessary to resign without notice, i.e., constructive dismissal, not being accompanied by being paid in respect of notice, amounts to breach of contract.

6. I noted that Mr Robert-Ogilvie confirmed that the Claimant had been receiving advice from her Union throughout, and that though she asserted she had been unfairly dismissed, she had been offered on 19 May 2022 and had accepted re-engagement on the specific terms of a new contract which preserved her continuity of employment, but admittedly assigned her to a post attracting a lower salary than hitherto. Nonetheless, she had accepted it on the same day and stated as set out below in an email to Ms Weir of the Respondents. This latter point was contentious initially, until the Claimant was confronted with evidence in the Bundle which she could not contradict or contest, showing the following which I find as facts, because in effect she had to and did accept what they say, despite Mr Robert-Ogilvie's efforts to persuade me not to interpret them as such: -

   6.1 (P97) 19 May 202 at 16.35 – email from Ms Weir to the Claimant stating – "Please find attached a copy of the contract of employment and job description of Transcare Nurse … " I find that this was indeed sent and received by the Claimant as is apparent from her response;

   6.2 (P97) 9 May 2022 at 18.34 – email from Claimant to Ms Weir stating specifically – "Please accept this letter as <u>acceptance of offer</u> of re-employment", which is then followed in the same message by – "This email <u>reconfirms that and serves as</u> tacit (sic – it is clearly express) and <u>unequivocal acceptance of your offer</u>";

   6.3 I have been shown a copy of the contract (separately adduced today but I note accepted by Mr Robert-Ogilvie) referred to in this exchange, and I note and find it is signed for by both Ms Weir AND the Claimant; It clearly states continuity of employment dates back to 29 October 2017 and thus continuity is preserved contrary to the Claimant's assertion otherwise;

   6.4 The Claimant now seeks to say that whatever she agreed in respect of re-engagement can be overridden by her seeking now to argue that this and the preceding events amount to breach of contract sufficient to justify resignation for the purposes of section 95(3) ERA;

7. I heard very detailed oral submissions from Mr Robert-Ogilvie over 1.5 hours and read his 6 page Skeleton Argument to which he spoke eloquently. He listed a large number of authorities which I have seen, some of which I was already aware. I have reconsidered the specific passages referred to, though they were only cited generically and without particularity by Mr Robert-Ogilvie. I find that most if not all references are general and not specific, or they are

otherwise distinguishable on facts, such cases being as they often are fact sensitive. Many the references are obiter and not binding by higher Courts and/or are not ratios decidendi in the cases cited. Mr Robert-Ogilvie also seeks to rely on cases referred to in the pleadings which, though not appropriately to be incorporated in pleadings, I have nonetheless considered anyway.

Case Law Cited

7.1 **Newbound v Thames Water Utilities [2015] EWCA Civ 677**

The Claimant's argument is that in this reported case the employer had a policy in place about vaccination of its staff, whereas no such policy existed in the present case. This point is a bad point since the Claimant in the present case is arguing the opposite and in any event whether or not a policy existed is irrelevant where there exist clear external Regulations (*The Health and Social Care Act 2008 (Regulated Activities)(Amendment)- Coronavirus) Regs 2021*) about vaccination thus rendering the presence or absence of a policy irrelevant; Further, the Claimant having elected to treat the events of May as a basis for claiming constructive dismissal, whatever happened in relation to the initial allegedly automatically unfair dismissal is in effect a redundant point; Lastly, the ratio in **Newbound** relates to issues pertaining to the issue of whether dismissal falls within the band of reasonable responses not being infinitely wide, which point is in effect overtaken in this case on point of fact by the offer of re-engagement and its acceptance ("the overtaken point");

7.2 **PSA v NMC & X [2018] EWHC 20**

The Claimant's argument is that "the approach to gathering evidence in this case was flawed" – whereas this decision relates to a decision by the NMC to drop allegations being made to the PSA despite being later described as adopting a cavalier approach in the investigative process leading to the proceedings before the PSA on completely different and unrelated facts compared with those in the Claimant's case – PSA expresses a point which was fact specific to the case in question and not a point of general application in employment law – again this is therefore a bad point in this case and its relevance was overridden by the fact that the matters to which it relates were overtaken by the offer and acceptance of re-engagement (again the "overtaken point");

7.3 **Parkview Care Ltd v Fenn [2019] EAT/0112/19**

The Claimant argued that in this case the ratio of the finding was that the primary cause of unfairness of any constructive dismissal was the unfairness of procedure adopted in disciplinary process; This is again a bad point as it is distinguishable on facts since Parkview was a case involving express dismissal and further it is common ground in the

pleadings that the disciplinary process in the present case took place in January 2022, whereas the Claimant resigned 30 May 2022 i.e. not timeously as required so as to be able to claim constructive dismissal;

7.4 **Sinclair v Trackwork Ltd [2020] EAT/0129/19/20**

The Claimant argues that this case is authority for the proposition that Section 100(1)(a) ERA is to be interpreted widely because of its purpose of protecting employees from being dismissed for causing "upset and friction"; I can agree that is the ratio, but I find it cannot be relevant in the present case because the initial dismissal was mitigated by the subsequent accepted offer of re-engagement and thus is caught by the "overtaken point";

7.5 **Smith v Trafford Housing Trust [2-12] EWHC 3221**

The Claimant's argument in reliance on this is that it is authority for the proposition that an employer does not have a right not demote an employee, which in that case was because of Facebook postings and that the imposition of demotion was an example of a breach of contract; On examination, the facts of the Smith case (expressing points of view) markedly differ from what is common ground in the present case which is thus distinguishable on its own facts (sending an unvaccinated staff member to a care Home in breach of current Regs), and in any event as it relates to the initial dismissal, had clearly on the Claimant's own case been caught by the "overtaken point";

7.6 **Mbuisa v Cygnet Healthcare [2018] EAT0119/18**

The Claimant's argument in reliance on this case was that it is authority for the proposition that strike out is a draconian step especially in a case relating to a S100 dismissal; I agree that this is a correct expression of the ration, but the present is distinguishable from **Mbuisa** since the Claimant has accepted that she was offered and accepted re-engagement and then sought to argue constructive dismissal – i.e. the "overtaken point";

7.7 **Tayside Public Transport Ltd v Reilley [2020]** CS IRLR 755

It is not clear what reliance is placed by the Claimant in this case save to say that what is cited is the general proposition with which I agree that all cases involving consideration as to Strike Out under rule 37 are fact specific; I recognise that the guidance available to me out of this case is that I must consider what is common ground and what is not and whether that which is not is so substantial as to make it necessary for there to be a full ventilation and examination of evidence before a final hearing panel; In this case however, what is noticeable is not a clear conflict of evidence but a clear difference of opinion as to what the effect of the accepted common ground facts might be;

7.8 Tree v SE Coastal Services Ambulance Trust [2017] EAT/00431/17

The Claimant refers to this case in relation to applications under Rule 39 for Deposit Orders, but that is not relevant here as on application of the case law relevant to this case and on examination of the pleadings and agreed common ground, I have found that there is no prospect of success in what is left of the Claimant's case which by her won concession at the start of the hearing is a complaint of constructive dismissal.

8. For the sake of completeness, I set out below the basis upon which I had to consider the position as far as set out in Rule 37(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 … has no reasonable prospect of success - (*my emphasis*) ;
   (b) … (c) … (d) … *(not relevant*);

9. Though neither side referred me to it, I am aware and trust that they are equally aware of the EAT decision in **Whitbread v Mills [1988]** as clarified by **Taylor v OCS [2006] EWCA EWCA Civ 702** which is authority for the proposition that a Tribunal should consider the fairness of a dismissal by reference to the whole procedure including appeal before determining whether a dismissal as the final outcome following appeal is to be found unfair or otherwise. Applying that principle to the Claimant's case and knowing that she has elected to treat her dismissal as the date she resigned, then If the Claimant were right about being potentially unfairly dismissed under S100 ERA in February 2022, then the outcome of the appeal is to be seen as part of the overall process and can have power to correct any earlier error in procedure because it overrides it – the "overtaken point".

10. Because the Claimant clearly and unequivocally accepted re-engagement, any preceding breach of contract was overtaken so the same "overtaken point" applies to her breach of contract claim and on her own case obviates it completely.

11. Again neither side referred me to it, but I took account of the Court of Appeal's finding in **Swain v Hillman [2001] 1 All ER 91** in which it was held that a Court (or Tribunal in this case) must consider whether a party " … has a realistic as opposed to fanciful prospect of success …" in the context of assertions as in this case that the Claimant's case has no, as opposed to little, prospect of success. In this case there is clearly on my examination no conflict of evidence on the key points such as would necessitate ventilation at a full hearing. I considered the balance of prejudice facing the Claimant if I struck out her case leaving her with no further way of arguing here views as to what has happened, or to the Respondent if the case were not struck out causing them to have to devote considerable time and energy to meeting a claim which on what I have seen and heard today and based on the Claimant's

admissions has no prospect of success. On this analysis I conclude that the balance of prejudice favours the Respondent leading me to conclude it is right I should strike out the claims.

12. For all the reasons set out above, I conclude paragraphs (a) of Rule 37(1) are engaged and empowers me to strike out the claims in accordance with rule 37. Therefore, I have no alternative but to dismiss the claims.

Employment Judge R S Drake

Signed 06 January 2023