EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103197/2022

Held in Chambers in Glasgow on 2 June 2023

Employment Judge D Hoey

Ms A Lee	**Claimant** **Represented by:** **Mr G Woolfson – Solicitor**
The Scottish Ambulance Board	**Respondent** **Represented by:** **Mr G Fletcher – Solicitor**

CASE MANAGEMENT ORDER

The respondent's application for a deposit is refused.

REASONS FOR DECISION

1. This case has had a lengthy procedural history, the claim having been lodged in June 2022. The case is now progressing.
2. The respondent applied for a deposit order in respect of the claim continuing, essentially as it was alleged the claimant's case was predicated upon an entirely innocuous event amounting to a last straw (implementation of a contractual term).
3. The parties agreed that they would provide written submissions and comment upon each other's submissions with a decision being made in chambers. Both parties lodged detailed written submissions with productions running to 114 pages.

4. I have considered the parties' submissions, the papers and the legal principles in this area.

Application and arguments

5. The respondent's written application runs to 10 pages. It is not reproduced in full, but it has been considered in its entirety. The respondent alleges that the majority of the facts are not in dispute. The claimant had been legally represented for a large period of time during the presentation of this case. In some respects the claimant has not complied with orders or at least not fully disclosed information and documents that were sought.
6. At the heart of the respondent's application is the assertion that the claimant's claim for constructive dismissal has little reasonable prospects of success. Whilst it was unclear precisely what the claimant was alleging, the respondent submits that the final straw now relied upon by the claimant was the imposition of half pay, which was an agreed term of the claimant's contract. It is submitted that enforcing an express term of the contract is highly unlikely to amount to a last straw and as such the prospects of the claimant successfully establishing a constructive dismissal is low.
7. The respondent also notes that it is likely that the claimant would have applied for and sought another job prior to the events occurring which it is said is a relevant factor. The circumstances around the new employment have not been made clear by the claimant.
8. The claimant's response (which runs to 7 pages with a number of attachments and a supplementary submission from her solicitor) is that, whilst ordinarily enforcing a contractual term would not amount to a breach of the implied term, the context is important. It is alleged that the claimant was fit for some work, but the respondent required the claimant to do something for which she was unfit, thereby resulting in her not being fit for work which in turn led to the claimant's absence and the decision to pay the claimant less than full pay (despite there being the discretion to extend full pay). The claimant says the context is important and that occupational health supports the position she advances.

9. The claimant points to the facts (which she offers to prove) that, what the respondent's agent had submitted was not accurate. It is said that the respondent's decision to reduce her pay was not simply because of the claimant's own refusal to attend work despite being considered fit by occupational health. In fact it is said that the claimant had been assigned to an alternative role that was supported by occupational health, no follow up with occupational health had been undertaken to assess the up to date in question, and there had been no discussions with the claimant before insisting she return to duties she said had caused her difficulties despite occupational health having said she was unfit to carry out said duties. It was the culmination of all these factors which led the claimant to resign.

Law

10. The Tribunal has the power to make a deposit order under Rule 39:
    a. Where at a preliminary hearing (under rule 53) the Tribunal considers that any 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.
    b. The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
    c. 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.
    d. If the paying party fails to pay the deposit by the date specified, the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
    e. 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— (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 (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

f. 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.

11. Thus, under Rule 39(1), if an Employment Judge considers that any specific allegation or argument in a claim or response has 'little reasonable prospect of success', the Judge can make an order requiring the party to pay a deposit to the Tribunal, as a condition of being permitted to continue to advance that allegation or argument.

12. In **H M Prison Service v Dolby** [2003] IRLR 694, at paragraph 14, a Deposit Order is the "yellow card" option, with Strike Out being described by counsel as the 'red card.'

13. The test for a Deposit Order is not as rigorous as the 'no reasonable prospect of success' test under Rule 37(1) (a), under which the Tribunal can strike out a party's case.

14. This was confirmed by the then President of the Employment Appeal Tribunal, Mr. Justice Elias, in **Van Rensburg v Royal Borough of Kingston upon Thames** [2007] UKEAT/0096/07, who concluded it followed that 'a Tribunal has a greater leeway when considering whether or not to order a deposit' than when deciding whether or not to strike out.

15. Where a Tribunal considers that a specific allegation or argument has little reasonable prospect of success, it may order a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

16. Rule 39(1) allows a Tribunal to use a Deposit Order as a less draconian alternative to Strike Out where a claim (or part) is perceived to be weak but could not necessarily be described by a Tribunal as having no reasonable prospect of success.

17. The test of ‘little prospect of success' is plainly not as rigorous as the test of ‘no reasonable prospect'. It follows that a Tribunal accordingly has a greater leeway when considering whether or not to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim – **Van Rensburg**.
18. Prior to making any decision relating to the Deposit Order, the Tribunal must, under Rule 39(2), make reasonable enquiries into the paying party's ability to pay the deposit, and it must take this into account in fixing the level of the deposit.
19. Finally, there is also the more recent guidance from Her Honour Judge Eady in **Tree v South East Coastal Ambulance Service NHS Foundation Trust** [2017] UKEAT/0043/17, referring to Mrs Justice Simler, then President of the EAT, in **Hemdan v Ishmail** [2017] ICR 486 and Judge Eady holding that, when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim.
20. **Hemdan** is also of interest because the learned EAT President, at paragraph 10, characterised a Deposit Order as being ‘rather like a sword of Damocles hanging over the paying party’, and she then observed, at paragraph 16, that: ‘Such orders have the potential to restrict rights of access to a fair trial.’

Recent guidance on legal principles

21. Mrs Justice Simler’s judgment from the EAT in *Hemdan*, at paragraphs 10 to 15, addresses the relevant legal principles about Deposit Orders and it is useful to reproduce those principles:

‘*10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and*

the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance

with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.'

Decision

22. I considered the respondent's application carefully in light of the authorities. While it has superficial attraction, and it has been difficult to understand the basis of the claim given the amount of information presented, given the position as it has now been set out, I am not satisfied that the claimant's argument has little reasonable prospects of success.

23. The claimant is arguing that the imposition of the contractual entitlement amounted to a final straw, but that argument is based upon the context. The context is important, and the claimant argues that had the respondent properly complied with its legal duties the claimant would not have been placed upon half pay since she would have continued to provide full service.

24. Looking at what the claimant is offering to prove, it cannot be said that there are little reasonable prospects of success from the material before me at this time. It is not simply the imposition of the contractual entitlement that the claimant in fact relies as the last straw but rather the context which led to that (and in fact the failure to, it is said, properly manage the claimant). The claimant offers to prove that had the respondent complied with its legal duties the claimant would not have been placed on half pay which led to the constructive dismissal and that the surrounding facts which led to the imposition of the contractual right led to her constructive dismissal.

25. As set out in **Omilaju v Waltham** [2005] ICR 481 the last straw requires to be conduct which contributes, even slightly, to the breach of contract and assessing the conduct as a whole to determine whether the implied term has been breached is done objectively. The last straw does not require to be a fundamental breach of contract.

26. While the claimant's argument is nuanced and has taken time to settle, it is not one which has little reasonable prospects of success in light of what is now suggested. It is entirely dependent upon the facts which require to be established in evidence. It is not possible to assess prospects without having heard the evidence and it would be inconsistent with the authorities to seek to do so. The application for a deposit order is therefore refused.

27. Given both parties are now represented by specialist employment lawyers it is hoped that the claims can now be finessed, focused and finalised, allowing the hearing now to proceed expeditiously. It is hoped the parties can agree the key facts necessary to progress matters and identify where the disputes are, thereby ensuring the overriding objective is achieved. It is in the interests of justice to progress matters expeditiously and have the claim finalised and determined.

Employment Judge: **D Hoey**
Date of Judgment: **05 June 2023**
Entered in register: **05 June 2023**
and copied to parties