EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000011/2023

Preliminary Hearing held at Dundee by Cloud Video Platform on 26 June 2023

Employment Judge A Kemp

Ms P Joyce	**Claimant** **In person**
Forth Valley Health Board	**Respondent** **Represented by:** **Mr R Davies,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal does not strike out the claim under section 103A of the Employment Rights Act 1996.

REASONS

Introduction

1. This was a Preliminary Hearing for the purposes of addressing an issue of strike out, and to determine an application for a witness order. It had been fixed after a warning had been given in the Orders issued following an earlier Preliminary Hearing before EJ Meiklejohn held on 10 May 2023, in which he indicated that he was considering striking out the claim as to automatic unfair dismissal as he was not clear whether there had been a

dismissal, and whether the claimant was an employee. This therefore was a matter on the Tribunal's initiative under Rule 37 referred to below. The claimant continues to act for herself, and Mr Davies acts for the respondent.

2. That hearing had followed an earlier Preliminary Hearing before me on 8 March 2023 in which orders had been granted which required specification of the claims made as there set out and as commented on by EJ Meiklejohn in his Note. In both earlier hearings the claimant was referred to with the second name "Sanson", and it has been amended to that above at her request.

3. Following the most recent Preliminary Hearing the claimant had sent a series of emails and documents, with reference to a total of 91 documents. It was not clear whether any of those documents related to the questions of dismissal or employee status, but were rather directed to the merits of the claims more generally. The case is one where there is an electronic file, which now has over 1,500 pages. It was understood however that the claimant did seek to argue that she had been dismissed, and was an employee, and the present hearing was then arranged. Initially I had suggested in an email sent on 23 May 2023 that the present hearing be conducted remotely, but by email also of 23 May 2023 the claimant had sought that it be in person. That was then arranged and a Notice of Preliminary Hearing sent to the parties. By email of 22 June 2023 however the claimant asked that it be heard remotely, the respondent did not oppose that, and arrangements were made for that on the following day. It was heard before me as EJ Meiklejohn has commenced a reasonably lengthy period of leave.

4. Although there were arguments put forward by both parties, Mr Davies helpfully took a practical approach to the issues that were raised and the subject of the witness order application has agreed to attend, as I shall come to below. The claimant also has a claim as to detriment under section 47B of the Act, addressed in more detail in the most recent Preliminary Hearing, which I explained was not affected by the issues at the present hearing as the protection of that provision applies to a "worker", a wider definition than that of an employee, and it is at least

arguable that a suspension from a contract with a consequent reduction in income is a detriment for the purposes of that section. The claimant had I understand considered that it was the whole claim that was under threat, and that may explain why she produced such a high volume of documents on matters that may well not have been relevant for this hearing. I take account of the fact that she is a party litigant in that regard.

The law as to strike out

5. The Rules are all subject to the terms of Rule 2. It states as follows:

> **"2 Overriding objective**
>
> 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."

6. Rule 37 was referred to by EJ Meiklejohn in his Note, but for ease of reference provides as follows:

> "**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 prospects of success……

(c) for non-compliance …..with an order of the Tribunal……..”

7. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

8. As a general principle, discrimination cases should not be struck out on the grounds of no reasonable prospects of success except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lord, Lord Hope of Craighead stated at paragraph 37:

> " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

9. These principles apply equally to an automatic unfair dismissal case such as the present, such that where there is a crucial core of disputed facts strike out should not take place– ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603***, and that was extended to “ordinary” unfair dismissal cases in ***Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755***. Such cases may be struck out if the circumstances warrant that, however. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. In ***Ahir v***

British Airways plc [2017] EWCA Civ 1392, in which the Court of Appeal stated that

> "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."

What is a dismissal?

10. The following summary is not intended to be exhaustive, but sets out the basic test for a dismissal as I understand it to be, in the context of the present hearing. In order to make a claim as to an automatically unfair dismissal under section 103A of the Employment Rights Act 1996 ("the Act") there must first of all be a dismissal. Dismissal is defined in section 95 of the Act. There are two potential circumstances that are relevant in the present case from the terms of that section, the second related to the expiry of a limited term contract not applying here –

> "(a) where the contract under which [the claimant] is employed is terminated by the employer (either with or without notice"
> or …..
> (c) the employee terminates the contract under which he is employed (either or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

11. In discussion it was clear that (c) was not being suggested by the claimant, in that she has not terminated any contract herself, but she suggested that (a) was engaged. At first glance that is a difficult argument to make where she accepted that what had happened was that she had been suspended, and was still being employed and paid about £330 per week by the respondent. The relationship between the parties has not terminated, but is continuing with payments still being made. But that continuing

relationship is not necessarily fatal to a dismissal in light of the case of ***Hogg v Dover College [1990] ICR 39***. The facts of that case are entirely different to that of the present one, and whether or not suspension which led to the claimant not working overtime and having a reduced income because of that could amount to a dismissal within section 95 is open to considerable doubt. There is also authority that may be said to be contrary to that or at least qualifying it, including ***Land v West Yorkshire Metropolitan County Council, [1981] IRLR 87,*** where again the facts were very different. There is however a basic principle that if there is the termination of one contractual arrangement and provision of new less advantageous contractual terms that could be in law a dismissal even though the relationship between the parties has not itself terminated.

Discussion as to dismissal

12. It appears to me that there could be a crucial core of disputed fact, or at least a situation where the assessment of whether or not there was a dismissal can be dependent on the facts better assessed after evidence is heard, such that it cannot be said that the claimant has no reasonable prospects of success on this issue. I consider that the claimant has not fully complied with the orders, but I consider that it is not in accordance with the overriding objective to strike out a claim which may yet have merit.

13. The respondent has complained of a lack of fair notice. It appeared to me that it was in accordance with the overriding objective to set out my understanding of the essentials of the claimant's case on dismissal, from what was said during the hearing by the claimant, and if the respondent seeks further detail it can seek an order for information under Rule 31. Setting out the Tribunal's understanding of the claim made is largely what EJ Meiklejohn did in relation to the claim as to detriment.

14. The essentials of the case of dismissal the claimant seeks to pursue appear to me, from what the claimant said during the hearing, to be that –

    (i) The claimant was informed that she was suspended from her employment by Mr Michael Brown in or around December 2022

(ii) Until that point she had been working around 50 hours per week and earning pay for doing so that included elements of overtime pay

(iii) The effect of the suspension was to reduce her income substantially, such that it was around £330 per week (the claimant did not state before me what the average income had been prior to the suspension, but said that it was materially higher)

(iv) Since then the respondent (on a date not set before me) had informed her that she was "inactive"

(v) She did not believe that she would return to working for the respondent as although she was willing to do so they had not offered her any work

(vi) She had been informed that she should not look for other work during her suspension, such that she was "stuck" in the present position

(vii) The effect of the suspension and the circumstances above was that the contract under which she had been working prior to the suspension had terminated, and a new contract for the suspension was in operation.

15. The claimant may make any proposals for amendment of the above paragraph if she wishes to, by email to the Tribunal and respondent, within 14 days of today's date, but otherwise these details can be taken as the claimant's pleadings on this point.

16. Having regard to the circumstances of the claimant being a party litigant, and the position overall which includes that there is a claim as to detriment, which the suspension could be argued to be as EJ Meiklejohn recorded, whether or not there was a dismissal may largely (and on one view solely) be a question of the label to attach, and may have either no or a limited effect on either the evidence that may be heard or the amount of a financial remedy in the event that the claimant were to succeed. I consider that the claim should not be struck out solely on the question of whether or not there was a dismissal, unless there is no reasonable prospect that the claimant can establish that she was an employee and strike out is otherwise proportionate. That is the issue to which I now turn

Law as to employee status

17. The test for employee status is not a simple one. The definition of "employee" is found in section 230 of the Employment Rights Act 1996 ("the Act") which provides:

> "**230 Employees, workers etc**
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> …….
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
>
> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
>
> (b) in relation to a worker, means employment under his contract
>
> and "employed" shall be construed accordingly."

18. The statutory definition is not of substantial assistance in a case such as the present. There is much case law on the matter of whether or not someone is an employee for the purposes of section 230 of the Act, and its predecessor provisions. What follows is not intended to be exhaustive, but a basic summary to consider the issue of whether the claimant has no reasonable prospects of success.

19. No one factor is determinative. The classic statement of the law in relation to who is an employee (using the terminology of master and servant which is broadly equivalent to employer and employee) was given by Mr Justice McKenna in ***Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance [1968] 2 QB 497*** as follows:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

20. That broad definition has been followed generally in subsequent cases. Guidance was given in the Court of Appeal case of ***Quashie v Stringfellow Restaurants [2013] IRLR 99*** in which Lord Justice Elias stressed the need to consider all of the circumstances to assess whether or not the person was an employee. The definition of an employee was also reviewed by the EAT in the case of ***Varnish v British Cycling Federation [2020] IRLR 822.*** The facts in these cases were very different to those in the present case.

21. There has separately been consideration of whether the relevant written terms of contract represent the true intentions or expectations of the parties, not just at the inception of the contract but, if appropriate, thereafter in the Court of Appeal case of ***Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365.*** The Supreme Court in ***Autoclenz Ltd v Belcher [2011] IRLR 820*** held that a written contract, containing two clauses which were not consistent with employment but where neither of which bore resemblance to reality, did not prevent there being an employment relationship. That may emphasise that the full circumstances may be relevant.

Discussion of employee status

22. I consider once again that the claimant has not fully complied with the terms of the orders made in the first Preliminary Hearing. I followed the same general process as for dismissal above. The circumstances of the present case, as explained to me by the claimant during the hearing and which I set out as a note of the claimant's pleadings on this point (subject to what follows) are that

(i) the claimant was contracted with personally, and was on a "bank" arrangement. That meant that she did not have to undertake work on any particular dates, but had shifts offered to her and could choose whether or not to take them.

(ii) She had in fact worked regularly and consistently around 50 hours per week, and save for periods of annual leave had not had spells away from work save for a day at a time occasionally.

(iii) She had started her role as a Bank Healthcare Assistant, and remained in that role.

(iv) She was paid an hourly rate for the work she did do, and was subject to deductions for income tax and national insurance. She had been offered membership of the pension scheme she thought, but had not taken that up.

(v) She had offered to work shifts since suspension, and had not worked for the period of suspension but been paid a standard sum per week which was equivalent to about 37 hours per week. She understood that it was a requirement to work a minimum number of shifts to stay on the bank and shortly after the hearing sent by email a document in relation to that, which indicated a minimum of six shifts each six months. She had been retained on the present arrangement.

23. The claimant can propose any amendment to the foregoing by email to the Tribunal with a copy to the respondent within 14 days of today's date.

24. Mr Davies explained that the respondent's position was that there was no mutuality of obligation. That is entirely understandable as an argument for the respondent but I am not satisfied that there is no reasonable prospect of the claimant succeeding simply because the respondent asserts that there was no mutuality of obligation as the claimant could refuse shifts offered to her (and their position may go beyond that to stating that there was no obligation to offer any shifts). There is an argument both that the requirement for a minimum number of shifts to remain on the bank undermines the issue of mutuality, and that the arrangement that the claimant seeks to found on, considering matters in the round, are sufficient to amount to an employment relationship. Whether or not that is so I do

not say but it appears to me that there is again a crucial core of disputed fact such that it cannot be said that the claimant has no reasonable prospects of success on this point, or separately that even if she did have no reasonable prospect of success, and has been in breach of the order at the first Preliminary Hearing to give specification in some respects as I have found she was, that it would not be in accordance with the overriding objective to strike out the claim prior to the hearing of evidence. Now that the basis of her position on employee status is understood, I consider that the respondent has at least some specification of the position such that it can prepare for the Final Hearing.

25. I consider that the same arrangement as to the respondent being able to seek an order for information if the detail set out above is not thought to provide it with fair notice of the claimant's position on this point.

26. In light of the foregoing analysis I did not strike out the claim for automatic unfair dismissal. I should add, for that avoidance of any doubt, that it should not be assumed from that decision that the claimant's arguments in this regard will succeed, or are likely to do so. These are questions that will be dependent on the assessment of the evidence heard, the submissions made, and the application of the law to the facts that the Tribunal finds established.

Witness order

(i) Application

27. The claimant sought a witness order for Ms Cathy Cowan, the respondent's Chief Executive. She set out her belief that Ms Cowan had been involved in the decision to suspend her, and had been involved if not responsible for setting the "culture" of the respondent in relation to matters of whistleblowing. She referred to an email sent recently by Ms Cowan to her, but not at that stage sent to the Tribunal, which indicated that she was prepared to attend but could not do so on some of the days. There was a brief adjournment whilst that email was sent to the Tribunal and passed to me, as well as to Mr Davies. The email did state that Ms Cowan was prepared to attend, but that she could not do so on the first three days of the hearing, only therefore available to do so on the final day, being

31 August 2023. The claimant sought a witness order, as she was concerned that Ms Cowan would not in fact attend.

28. Mr Davies' position was simply that a witness order was not necessary given the circumstances of Ms Cowan attending voluntarily provided that that was on the day that she could manage having regard to her commitments as Chief Executive.

(ii) Law

29. A witness order is provided for in Rule 32 within the Employment Tribunals (Constitution and Rules of Procedure) Regulations, Schedule 1. The Tribunal has a discretion on whether or not to do so. It is considered having regard to the terms of Rule 2. The case law, including for example ***Christie v Paul, Weiss, Rifkind, Wharton & Garrisson LLP UKEAT/0137/19*** which helpfully addresses the principal authorities, indicates that in considering that discretion the tribunal should have regard to whether the witness can give evidence relevant to the issues before it, whether that witness attending is reasonably necessary for a fair hearing of those issues, and whether granting the order is proportionate having regard to the overriding objective.

(iii) Discussion

30. Whilst Ms Cowan's email indicating agreement to come to attend to give evidence is not conclusive as to her being potentially able to give relevant evidence, it seemed to me from the comments made by the claimant that there was at least a basis on which to argue that that was so. The claimant could not point to any particular document supporting her contention that Ms Cowan had been involved in the decisions relevant to her claim, but it may be that such documents do not exist. I considered that Ms Cowan could give relevant evidence, and that the attendance of the witness was reasonably necessary to allow the claimant to put her case, thus having a fair hearing, particularly where the claimant has the onus of proof, and the issue of causation will be liable to be central to the decision the Tribunal will require to make. That left the issue of proportionality. Ms Cowan has agreed to attend in principle, and wishes to avoid doing so for three of the four days allotted. Mr Davies was in principle content that Ms Cowan

attend on the last day, although that means that her evidence, being called for the claimant, will be interposed within that of the respondent's witnesses.

31. The claimant is to call herself to give evidence, and has not decided whether to call anyone else apart from Ms Cowan. The respondent intends to call five witnesses. It is not at this stage clear whether the calling of Ms Cowan late in the order of witnesses will affect matters, but Mr Davies wished to reserve his position on that, which I consider is reasonable given the circumstances. It may be difficult to conclude all the evidence in the four days that have been allotted, but attempts to do so can be made. If an issue arises over the evidence Ms Cowan is to give, that can be addressed at that time by the Tribunal conducting the case.

32. It appeared to me that there was not likely to be a substantial prejudice to the respondent or Ms Cowan if I were to grant the witness order that the claimant seeks, and the claimant has concerns over whether there would in fact be voluntary attendance, such that given all the circumstances it was in accordance with the overriding objective to grant the witness order sought, and to do so for 31 August 2023 only.

33. That order will be issued separately.

Employment Judge: **A Kemp**

Date of Judgment: **27 June 2023**

Date sent to parties: **28 June 2023**