



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Cases Nos: 4103643/2023 and 4103940/2023

10 **Ms Pauline Joyce**

**Claimant
In person**

15 **Forth Valley Health Board**

**Respondent
Represented by:
Mr R Davies
Solicitor**

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JUDGMENT

1. **Claim number 4103643/2023 being outwith the jurisdiction of the Tribunal is dismissed.**
 2. **Claim number 4103940/2023 having no reasonable prospects of success is struck out under Rule 37.**
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REASONS

Introduction

1. These are two claims which have earlier been combined. The first claim is under number 4103643/2023 and is pursued solely as one for breach of contract. The second claim is under number 4103940/2023 and is pursued solely for unlawful deduction from wages.
 2. The present hearing was fixed to consider issues of jurisdiction and strike out for each case respectively. It was heard on the same day as three E.T. Z4 (WR)
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other claims by the claimant against the respondent which are dealt with by separate Note.

Breach of contract 4103643/2023

5 3. The claimant avers that she has been suspended by the respondent. She does not suggest that the contract between them has been terminated. The Tribunal wrote to the claimant to raise the issue of whether such a claim was within its jurisdiction. The claimant was given an opportunity to respond to the point on jurisdiction either by stating when the contract terminated or by setting out an argument for the Tribunal having jurisdiction. She provided a response to the terms of the grounds of resistance by the respondent but did not specifically address jurisdiction when doing so. Her response included documents with regard to the suspension, and arguments as to what the respondent had not done during that suspension. The matter was then addressed at the present Hearing.

Law

4. The Tribunal is a creature of statute. It derives its jurisdiction in relation to claims of breach of contract solely from the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. Paragraph 3 of that Order provides as follows:

“3 Extension of Jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

- (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;
- (b) the claim is not one to which article 5 applies; and
- (c) the claim arises or is outstanding on the termination of the employee's employment.”

Discussion

5. There is no suggestion that the claimant's employment has terminated. During the hearing before me, the claimant accepted that it continued, and explained that she was continuing to be paid by the respondent. She has now been informed that it will not use her services, and an investigation into other matters (addressed in a separate Note concerning other claims) is not yet concluded.
6. The averment is that there has been suspension, which is inconsistent with any contract having terminated. It was made clear that that remains the position in the hearing before me. The said Order specifies that in order for there to be jurisdiction for the Employment Tribunal to consider a claim for breach of contract that contract requires to have terminated. That leaves aside the separate issue of whether or not the contract is one of employment.
7. In the absence of the termination of the contract between the parties the Tribunal does not have jurisdiction to consider the claim, even assuming that the claimant is in law an employee.
8. As a result, this Claim must be dismissed. For the avoidance of doubt, that does not affect any right that the claimant has to pursue this issue in a civil court, but that is not a matter for me.

Unlawful deduction from wages 4103940/2023

9. During the hearing I raised with the claimant the basis on which she argued that sums were properly payable. I suggested that she send the terms of contract. Following the hearing the claimant sent an initial email with part of the contract, the parties were asked for the full contract and that was provided by the respondent. The claimant replied firstly to confirm that the contract appeared to be the correct one, and secondly to comment further on the hearing and her position. The claimant's position is addressed further below.

Law

10. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in Rule 2 in the

Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which 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.”

11. Rule 37 makes provision for strike out and 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 prospect of success.....”

12. 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”.

13. Wages are defined in section 27 of the Employment Rights Act 1996 as “any sums payable to the worker in connection with his employment, including

(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise.....”.

14. The Court of Appeal held in ***New Century Cleaning Co Ltd v Church [2000] IRLR 27*** that some form of legal obligation was required to fall within the statutory provision. In ***Coors Brewery Ltd v Adcock [2007] IRLR 440*** the same court held that whatever is being claimed must be quantifiable; if the claim is in effect for unliquidated damages there is no jurisdiction under Part II of the 1996y Act and the claimant (if still in employment) must bring a breach of contract claim in the ordinary courts, That court held in ***Tradition Securities and Futures SA v Mouradian [2009] EWCA Civ 60***, where the employee had a clear contractual right to a bonus which was to be payable “in such amount as [deemed appropriate] in consultation with the Chief Executive Officer whose reasonable decision will be final” the employment tribunal's jurisdiction is engaged once the bonus had been declared and quantified. Until then it appears to me to follow that it would not be, as the amount payable had not been quantified.

15. In ***Davies v Droylsden Academy UKEAT/0044/16*** an unlawful deductions claim was brought by a claimant who was entitled to basic pay and a variable bonus. The EAT held that when dealing with unlawful deduction claims the tribunal must make clear findings of fact as to ‘the claimant’s contractual entitlement to pay or... to payments that were properly payable by reference to her employment in order to identify whether and to what extent there had been a shortfall’.

16. In ***Agbeze v Barnet, Enfield and Haringey Mental Health NHS Trust [2022] IRLR 115*** the EAT held that a suspended worker who was denied any pay could not rely on an allegedly implied term that had the

effect that average wages were contractually payable while he was suspended.

17. Whilst the “properly payable” aspect of the statutory test need not be found within the contract necessarily as the section has the words “or otherwise”,
5 it is clear that some form of legal obligation must be said to have arisen, and that that is an obligation that can be quantified on some proper basis. If it cannot be, then it cannot be “wages” under the statutory definition.

Discussion

18. The claimant was asked to explain her case in this regard at the hearing.
10 She said that under the contract she could choose which hours and days to work, and that she operated on a “bank” system. She believes that she would have had flexibility and choice which the current payments do not provide to her. When asked to set out what was the difference between what she was paid, and what she claimed, she could not do so. She said
15 that her claim was for not having that choice.

19. In the hearing the claimant did not dispute that some form of average was being used, but argued that she had lost both choice and flexibility. When asked to quantify that, she said that she could not, and that she could offer no more by way of explanation or argument. In her most recent email she
20 has in effect complained about not being given an opportunity to explain her position, but I did not have any impression during the hearing that that was the case, she did not seek during the hearing any more time to do so, and she has had opportunities since the claim was raised and the respondent’s response sent to her to take any advice she wished to, carry
25 out any investigation she wished to, and to address matters at the present hearing, which was fixed in part to determine this particular issue. I consider in light of that that the claimant has had a fair opportunity to put forward her arguments, and that the process has been carried out in accordance with the Rules, including Rule 2.

- 30 20. I had suggested to the parties that it would be helpful if the claimant sent the contract she had with the respondent to the Tribunal. They were content with that. I explained that I would look at its terms, and consider whether or not there was a claim that the claimant could pursue on the

basis of it that was one which was capable of being determined at a Final Hearing, which has been fixed for 18 January 2024, or not. It appeared to me that in the circumstances where the respondent states, properly in my view, that it is not aware of the basis on which sums are said to be payable, that that was in accordance with the overriding objective. Even if a case might have no reasonable prospects of success it is still necessary to check to see whether there may yet be a claim with merit as part of the assessment under Rule 2.

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21. I have considered the terms of the contract. The respondent suggested that I should not direct the claimant to any particular clause within it, but I consider that where the issue is one of strike out I require to consider whether there may yet be a claim that has merit, as the authority above refers to. I am conscious that I should not seek to determine an issue of fact which may be contested, and that I should give due allowance to the fact that the claimant is a party litigant who may not express fully in legal terms the issues she seeks to raise. There have however been a number of attempts to clarify on what basis the claimant seeks to pursue the present claim, and I require to consider when assessing what to do both the terms of Rule 37 and Rule 2, the latter of which has the overriding objective.

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22. I have been driven to the conclusion that it is appropriate under the overriding objective to strike out the claim on the basis that it has no reasonable prospects of success. I can find no basis within the contractual terms provided to me to set out an obligation of some kind to pay the claimant a sum greater than is in fact being paid. No other basis on which such an obligation, so as to amount to a sum being "properly payable" was provided, and I am not aware of any. On the contrary, the case law I have referred to is to the effect that there is not an implied term that can be applied to found the claim, that is enhanced by the express term of contract that the respondent is not obliged to provide any work, and it appears to me that the claim is not for liquid, or ascertained, damages. Each of these matters indicates that there is no basis in law for the claim made so as to fall within the definition of wages in section 27, either as raised by the claimant or that I have been able to ascertain from what is

before me or as she has pled or described. I consider from that analysis that there is no basis for a claim as to unlawful deduction from wages under the statutory definition.

5 23. I consider that in all the circumstances that the claim made does have no reasonable prospects of success, and that it is in accordance with the overriding objective to strike it out under Rule 37.

24. The Final Hearing fixed for 18 January 2024 to address these two claims shall not therefore proceed.

10 **Employment Judge: A Kemp**
Date of Judgment: 13 November 2023
Date sent to parties: 14 November 2023