



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4112400/2021**

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**Held in Glasgow on 8 November 2023**

**Employment Judge Sutherland**

10 **Mr Graeme Madden**

**Claimant  
In Person**

15 **Waracle Limited**

**First Respondent  
Represented by:  
Mr S Allison -  
Solicitor**

20 **Cathcart Associates Ltd**

**Second Respondent  
Represented by:  
Mr S Wason -  
Solicitor**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The Judgment of the Tribunal is that –

1. The Respondents' application for strike out of the complaint of automatically unfair dismissal is granted and that complaint is dismissed.
2. the Respondents' application for strike out of the complaint of failure to pay notice pay is refused.
- 30 3. The parties' application to add PayStream My Max Limited as a Third Respondent is granted.

## REASONS

### Introduction

1. The Claimant has made complaints of unfair dismissal, disability discrimination and failure to pay notice pay. The complaints are denied by the Respondents.  
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2. An open preliminary hearing was listed for today to determine the following issues –
  - a. The Respondents' application for strike out of the complaints of unfair dismissal and/or failure to pay notice on the grounds of no reasonable prospects of success.  
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  - b. The parties' application to add PayStream My Max Limited as a Third Party.
3. The hearing was held remotely by CVP (video). The Claimant appeared on his own behalf. The First Respondent had professional representation. Mr Wason appeared on behalf of the Second Respondent.  
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4. The Claimant stated in his claim that he was uncomfortable with his camera on. He confirmed that he was content for today's hearing to proceed with his camera on.
5. No witness gave oral testimony at this hearing. Although there was no joint bundle of documents, parties provided copies of relevant documents.  
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6. The First Respondent and Claimant had made prior written submissions. All parties made oral submissions.

### The complaints

7. Having regard to his claim (lodged on 12 November 2021), the additional information previously provided in writing, and the information provided orally at today's hearing, the Claimant's complaints are as follows:  
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*Discrimination/ harassment*

8. The complaint of disability discrimination proceeds only against the First Respondent only. The First Respondent accepts disability status but denies knowledge at the relevant time.

5 *Unfair dismissal*

9. The Claimant has made a complaint of unfair dismissal. In his claim he references being dismissed after he had explained his medical conditions and that he felt very self-conscious on camera. The Claimant accepts that he does not have 2 years. At the Case Management Preliminary Hearing ('CMPH') on 10 17 January 2022 the Claimant was ordered to set out within 21 days the factual and legal basis upon which he asserts that one of the exceptions in Section 106 (3) applies. At the CMPH on 27 September 2023 the Claimant was ordered to provide those further particulars by 11 October. On 10 October the Claimant asserted having made a flexible working request but gave no 15 other details. On 20 October the Claimant advised he made the request to Janice, his line manager. On 7 November the Claimant advised that he was dismissed because he asked for a reasonable adjustment and accordingly he was dismissed for asserting a statutory right. At today's hearing the Claimant advised that he was dismissed because he asked for a reasonable 20 adjustment, because he complained about being harassed and/or because he complained about the failure to make a reasonable adjustment.

*Failure to pay notice pay*

10. The Claimant seeks payment of 28 days' notice pay pursuant to a contract with the First Respondent, Second Respondent or Paystream My Max Ltd. 25 (At today's hearing the Claimant clarified that the reference to 18 weeks' pay in respect of the remainder of the contract was relevant to remedy in respect of the complaints of unfair dismissal and/or discrimination only and was not brought as a stand-alone pay claim.)

**Facts not in dispute**

11. Having regard to the pleadings and the further particulars (considered with reference to the contemporaneous documents) it is understood that the following facts are not in dispute -
- 5 12. The First Respondent required work or services to be performed. The First Respondent entered into a contract with the Second Respondent to identify and supply a consultant to perform that work or services. The Claimant was interviewed and approved by the First Respondent.
- 10 13. On 9 July 2023 the Second Respondent sent an email to the Claimant stating: “Congratulations on securing the contract at Waracle [First Respondent]. I am really pleased to have helped out...The contract will begin on 19/07/2021 and this will run for 26 weeks, until 15/01/2022. At the end of the contract, we will discuss possible extension for you. The rate is confirmed at £450 per day (+ VAT if appropriate). Any expenses accrued must be agreed in advance with client and will be paid to you directly by the client. You, as the service provider, will have a 28 day notice period should you wish to serve notice on the contract. The client’s notice period is 28 days...” The Second Respondent sent a further email on the same day stating “Congrats again on the offer...Can you please send over your proof of RTW, [contact details] & I’ll get them over to Waracle [First Respondent] so they can get started on the onboarding process”.
- 15 14. On 13 July the Second Respondent sent the Claimant an email asking him “Did you mention you are happy to go through PayStream? Or you can go through Parasol – either will do”.
- 20 15. Parasol is an “umbrella company” which employs contractors who are supplied on assignment to clients. The Claimant was unhappy at having to go through an umbrella company but understood it was a requirement. The Claimant felt he had prior negative experience of Parasol and elected to go through PayStream instead.
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16. On 14 July the Claimant entered a contract with PayStream My Max Limited (“PSMM Ltd”) in respect of the work or services to be performed for the First Respondent. The contract stated in summary that it was a contract of employment between the Claimant as employee and PDMM Ltd as employer; that PDMM Ltd provides the services of its employees on assignments to customers; that the Claimant would be paid basic pay at the National Minimum Wage; that the Claimant would be paid commission being the difference between the monies paid by the customer and its own costs; that it may be terminated on statutory notice or summarily in certain circumstances; and that it was the entire agreement and supersedes prior representations, etc.
17. The Second Respondent entered into a contract with PSMM Ltd to provide services to supply a consultant, whom it employs, to provide services to a client.
18. The Claimant performed work or services for the First Respondent. The Claimant received payslips from PSMM Ltd in respect of that work. The payslips stated that PSMM Ltd was his employer and that the Second Respondent was the agency. He was paid basic pay and commission. PSMM Ltd charged the Claimant around £20 a week for their services.

## 20 The law

### *Strike out*

19. Under Rule 37(1) of the Employment Tribunal Rules of Procedure, a Tribunal may strike out all or part of a claim or response on various grounds including-
- (a) *that it is scandalous or vexatious or has no reasonable prospects of success.*
20. In light of the severe consequences of strike out, such a decision is considered a draconian step which should only be taken on the clearest grounds and as a matter of last resort. Its purpose is not to punish the conduct but rather to protect the other party from the consequences of the conduct (*Bolch v Chipman [2004] IRLR 140, EAT*).

21. Before making a strike out order, the tribunal must give the relevant party a reasonable opportunity to make representations, either in writing or, if requested by that party, at a hearing.
22. Strike-out on grounds of no reasonable prospects is considered by means of a summary determination. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts. Exceptional circumstances may arise where disputed facts are totally and inexplicably inconsistent with undisputed contemporaneous documentation. Discrimination and unfair dismissal cases are generally fact sensitive and therefore strike out on this ground is exceptional. Where there are no reasonable prospects the Tribunal must decide whether to exercise its discretion mindful that full evidence has not been heard, although the Tribunal should not be deterred in the most obvious of cases.
23. Having regard to the EAT guidance in Cox v Adecco and ors 2021 ICR 1307, EAT -
- (1) *No-one gains by truly hopeless cases being pursued to a hearing;*
- (2) *Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;*
- (3) *If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;*
- (4) *The Claimant's case must ordinarily be taken at its highest;*
- (5) *It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;*
- (6) *This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair*

*assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;*

5 (7) *In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;*

10 (8) *Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be*  
15 *expected of a lawyer;*

(9) *If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant*  
20 *circumstances.”*

#### *Amendment*

24. The Tribunal has a broad discretion under Rule 29 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 to allow amendments at any stage of the proceedings either on its own initiative or on  
25 the application by a party. Furthermore Rule 34 specifically provides that the tribunal may, on its own initiative, or on the application of a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have  
30 determined in the proceedings. Such discretion must be exercised in

accordance with the overriding objective of dealing with cases fairly and justly under Rule 2.

25. According to the EAT guidance in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661 the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The following were indicated to be relevant considerations: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

### **Submissions**

26. The Respondents' oral submissions were in summary that the complaints had no reasonable prospects on the following grounds –

#### *Unfair dismissal*

- a. A dismissal is automatically unfair, and does not require 2 years service, if the reason is that the employee make an application for flexible working under Section 80F. Such an application must be made in writing by an employee with 26 weeks service. The Claimant did not therefore qualify.
- b. A dismissal is automatically unfair, and does not require 2 years service, if the reason for dismissal is that the employee alleged the employer had infringed a relevant statutory right. Relevant statutory rights do not include discrimination rights under the Equality Act 2010.

#### *Notice pay*

- c. The Claimant had a written contract of employment with PSMM Ltd in respect of the work or services he performed for the First Respondent. The Claimant had no contract with the First or Second Respondent and accordingly no entitlement to notice pay.



*Adding a third respondent*

- 5 d. The Claimant seeks payment of notice for termination of his contract of employment. The Claimant's contract of employment was with PSMM Ltd. This is accordingly an issue arising between the Claimant and PSMM Ltd and if this complaint is not struck out it is in the interests of justice to add them to the proceedings.

27. The Claimant's oral submissions were in summary as follows –

*Unfair dismissal*

- 10 a. He was dismissed because he asserted a statutory right and/ or made a flexible working request and accordingly his dismissal is automatically unfair and he does not require 2 years service.

*Notice pay*

- 15 b. The Second Respondent advised him he was entitled to 28 days notice in respect of the work or services he was to perform for the First Respondent and that amounted to an contractual agreement. The Second Respondent were acting either on their own behalf or as agent for the First Respondent or PSMM Ltd.

*Adding a third respondent*

- c. It is in the interests of justice to add PSMM Ltd as a respondent.

**20 Discussion and decision**Applications for strike out*Unfair dismissal*

- 25 28. Under Section 108 of the Employment Rights Act 1996 an employee cannot claim unfair dismissal unless he has 2 years service or one of the exemptions applies. Taking his case at its highest (which would require introduced by amendment), the Claimant asserts that he was dismissed because he sought a reasonable adjustment, because he asked for a reasonable adjustment,

because he complained about being harassed, because he complained about the failure to make a reasonable adjustment and/or because he made a flexible working application. The Claimant seeks to rely upon the exemptions provided in respect of Sections 104 (Assertion of a Statutory Right) and 104C (Flexible Working Applications).

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29. Seeking a reasonable adjustment and/or complaining about the failure to make such an adjustment or complaining about being harassed does not amount to the assertion of a relevant statutory right under Section 104 and accordingly the exemption does not apply. (Dismissal for asserting a right not to be discriminated against under the Equality Act 2010 is protected within that legislation by way of a claim for victimization under Section 27.) For the flexible working exemption to apply the application must be made under Section 80H. Such an application must be made in writing by an employee with 26 weeks service. The Claimant did not therefore qualify and the exemption accordingly does not apply. The complaint for unfair dismissal therefore has no reasonable prospects of success.

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30. Recognising that strike out is a draconian step which should only be taken on the clearest grounds and as a matter of last resort, and noting that the Claimant is not without other remedy, it is considered in furtherance of the overriding objective for the complaint of unfair dismissal to be struck out on the basis that it has no reasonable prospects of success.

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#### *Notice pay*

31. The Claimant understood that the Second Respondent's use of the phrase "The client's notice period is 28 days..." meant he would be entitled to 28 days' notice of termination. Alternatively this may be a reference to termination of their contract with the supplier. It is not possible to make a summary determination of the effect of the relevant email in the relevant contractual nexus without hearing evidence in the context of a proper trial of the legal issues. Accordingly the application for strike out of the complaint of failure to pay notice pay is refused.

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Application to add PSMM Ltd as a third respondent

32. The Claimant's original ET1 claim was made against three Respondents including the Second Respondent and PayStream Accounting Services Limited ("PSAS Ltd"). It was rejected in respect of the Second Respondent and PSAA Ltd because there was no ACAS EC Certificate. The Second Respondent was then added to the proceedings under Rule 34 at Case Management Preliminary Hearing on 17 January 2022. The Response provided by the Second Respondent on 10 February 2022 noted, erroneously, that PSMM Ltd had been added as a Respondent to the proceedings. It is not known whether the Second Respondent raised this with PSMM Ltd.
33. On 22 March 2022 an unless order was issued requiring the Claimant to provide further particulars. On 19 April the claim was dismissed for failure to comply with the unless order. On 20 May the Claimant's application to have the unless order set aside on health grounds was refused. On 31 October 2022 his application for reconsideration of that decision was refused. On 23 March 2023 his application for reconsideration of that decision was successful in light of additional medical information and the decision to dismiss the claim was revoked.
34. According to information available on Companies House, PSAS Ltd provides accounting and payroll services to companies and individuals. Both PSAS Ltd and PSMM Ltd are wholly owned by PayStream My Max Holdings Limited. The Claimant's written contract is with PSMM Ltd and states that it is a contract of employment and that PSMM Ltd is his employer. The payslips provided also state that PSMM Ltd is his employer.
35. The unamended claim for notice pay was brought within the statutory time limits. The claims against PSMM Ltd would be in the same terms as currently plead.
36. There has been a substantial delay in this case being listed for a final hearing. This delay is largely due to the significant time taken to revoke the decision to dismiss the claim. The issue of the correct identify of the employer was live at

the time of the unless order and was reactivated a year later when the decision to dismiss the claim was revoked.

- 5 37. Allowing the amendment may give rise to further procedure including a possible application for reconsideration and a further case management preliminary hearing but should not give rise to a substantial delay. Given that this claim was lodged in December 2021 it is however imperative that it proceeds to a final hearing as soon as reasonably practicable.
- 10 38. Refusing the amendment may prevent the Claimant from having recourse to a remedy in this forum in the event of a finding that PSMM Ltd was his employer. However, it is noted that he could bring a claim for breach of contract in another forum within 5 years. In either case PSMM Ltd may seek to rely upon the entire agreement clause.
- 15 39. Allowing the amendment would put PSMM Ltd to cost and inconvenience but no greater than if they had been included as a respondent within the original claim.
- 20 40. Taking into account all the circumstances and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, the application to add PSMM Ltd as Third Respondent is granted in respect of the complaint for 28 days' notice pay. There are issues between PSMM Ltd and the Claimants falling within the jurisdiction of the Tribunal which it would be in the interests of justice to have determined in the proceedings.

41. This decision has been reached in the absence of PSMM Ltd who may apply for reconsideration of this decision under Rule 71.

5      **Employment Judge:      M Sutherland**  
       **Date of Judgment:      10 November 2023**  
       **Entered in register:      13 November 2023**  
       **and copied to parties**

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