



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4102917/2023 Preliminary Hearing by Cloud Video Platform (CVP)
at Edinburgh on 21 August 2023**

Employment Judge: M A Macleod

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Lisa Collier

**Claimant
In Person**

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West Lothian Leisure

**Respondent
Represented by
Mr D Milne
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal under section 94 of the Employment Rights Act 1996 is dismissed for want of jurisdiction, on the basis that the claimant lacks the minimum qualifying service of 2 years under section 108(1) of the Employment Rights Act 1996.

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NOTE

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1. The claimant presented a claim to the Employment Tribunal on 7 May 2023 in which she complained that she had been unfairly dismissed by the respondent.
2. The respondent submitted an ET3 response form in which they resisted the claimant's claim.

3. On initial consideration by Employment Judge P O'Donnell, it was noted that the claimant had only ticked the box marked unfair dismissal, and was employed from 10 July 2021 until 28 February 2023, a period of less than 2 years.
- 5 4. Accordingly, a letter was issued to the claimant on 9 June 2023 in the form of a Notice under Rule 27 of the Employment Tribunals Rules of Procedure 2013. It was noted by Employment Judge O'Donnell that since the claimant had less than two years' service, as required by section 108(1) of the Employment Rights Act 1996, and since the ET1 did not, on the face of it,
10 plead a claim of automatic unfair dismissal, the Tribunal did not have jurisdiction to hear the claim.
5. He therefore ordered that the claim should be dismissed on 23 June 2023 without further order unless before that date the claimant presented written representations to the Tribunal explaining why the claim should not be
15 dismissed. It was noted that if such representations were received in time a hearing may be fixed in order to decide whether or not the case should be allowed to proceed.
6. A Hearing was subsequently fixed to take place by CVP on 21 August 2023, for the purpose only of determining whether or not the claim should be
20 dismissed.
7. The claimant appeared on her own behalf, and the respondent was represented by Mr D Milne, advocate.
8. The claimant had asked a witness to attend. When I asked her to confirm why she wished the witness to give evidence, she explained that the
25 witness would be able to support her argument that statements which were used to bring about her dismissal were "fraudulent". I advised that this is a matter relating to the merits of the case, which we were not there to determine in this Hearing.
9. I explained that the purpose of this Hearing was solely to decide whether or
30 not the Tribunal had jurisdiction, or power, to hear the claim.

10. The claimant accepted that she was employed by the respondent for less than 2 years. She confirmed that she had only ticked the box, at paragraph 8.1 of the ET1, marked unfair dismissal. She did not believe that her claim fell under any of the categories set out under the discrimination box, including sex, and repeated that understanding to me in this Hearing. She said that she was unsure what to put her claim under.
11. She observed that there were two sides to her case: firstly, she was in breach of the social media policy of the respondent (albeit that she maintains that she was not aware of it and had not seen it); and secondly, that there was a failure by the respondent to meet its duty of care towards the claimant, especially by David Fitzpatrick.
12. She did not see a section in which she could complain of sexual harassment. She had no assistance in completing the ET1, although she had spoken to ACAS about the process and had received some advice from them.
13. I noted that in her ET1, in paragraph 8.2, the claimant had set out an allegation that she had been sexually harassed by a customer in the gym where she worked out, as she was a lifeguard in the same building. She gave details of the activities of this customer which she alleged amounted to sexual harassment. She then set out her complaints in relation to what she considered to be an unfair dismissal, and listed a number of issues she said she faced during the disciplinary process and her dismissal, including: "Breach of the law (equality act 2010) which protects employees and workers against sexual harassment – vicarious liability."
14. I asked the claimant what she had meant by this statement. She said that as soon as she went into the investigation and found out what the complaint against her was about, she was distressed. She had spoken to Mr Fitzpatrick and reported to him that she had been sexually harassed. She described this as "guilty knowledge", and complained that Mr Fitzpatrick had never taken any steps to protect her. She alleged that Mr Fitzpatrick had simply advised her to stay away from the gym as much as possible, but she

could not understand why she was the one who was told to stay away from the gym, when she had been the victim of harassment by a customer who was allowed to remain in the gym and continue to use it. There was no protection for her, nor care towards her.

5 15. She accepted that she should not have put the comments on social media as she did, but described them as a “cry for help”.

16. Mr Milne responded, on behalf of the respondent, by pointing out that section 108(1) of the Employment Rights Act 1996 does not permit the Tribunal to reduce the minimum qualifying period for an unfair dismissal claim to less than 2 years.

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17. He went on to say that the claimant appears to be complaining that the respondent should have taken certain steps to deal with sexual harassment of the claimant. He referred to the Court of Appeal Judgment in **Unite the Union v Nailard 2019 ICR 28**, and in particular to the Judgment of Lord Justice Underhill. He submitted that the claimant’s claim, which related to the actions of a third party not employed by the respondent, could not proceed, and that this decision was authority for that.

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Decision

18. There are two aspects to this case.

20 19. Firstly, the claimant lacks 2 years’ qualifying service with the respondent. As a result, the Tribunal has no jurisdiction to hear a claim of unfair dismissal on her behalf. It is difficult for the claimant to understand this, but essentially, the Tribunal can only hear a case of unfair dismissal if the claimant can show that she has worked for the respondent for a period of at least 2 years. There is no dispute that this claimant cannot show this. As a result, the law requires that the unfair dismissal claim should be dismissed.

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20. Secondly, however, there is another aspect to the case, which is much less clearly identified by the claimant. I take into account the fact that the claimant is an unrepresented party, who has no legal qualifications.

21. It is, though, clear that the claimant sought to introduce an allegation of sexual harassment into the claim against the respondent.
22. The allegation relates to the actions of a customer at the gym which is in the same building as the pool where she is a lifeguard. The customer is not an employee of the respondent, and accordingly there can be no vicarious liability on their part in respect of his actions. They are not responsible for the actions of an individual who is not employed by them.
23. Where this claim is unclear, however, is what the claimant intends to claim when she makes reference to sexual harassment, and to the Equality Act 2010.
24. The **Nailard** case makes clear the limits of vicarious liability, and the liability of a principal for an agent. That liability would only arise where the agent discriminated against an individual in the course of carrying out the functions he was authorised to do.
25. The claimant's complaint of sexual harassment is very vague, as currently drafted, and as a result, it is not entirely clear what legal basis she has for making such a complaint against the respondent.
26. If the claimant seeks to hold the respondent liable for the actions of the customer, it seems to me that there is no basis for such a claim.
27. However, it appears to me that the claimant's criticism is primarily of Mr Fitzpatrick, for his actions, or failure to act, following his "guilty knowledge" of the allegations she was making against the customer.
28. My concern, as I expressed it in the Hearing, is not that there is a clear and obvious complaint laid before the Tribunal which can be dealt with, but that there is a potential complaint, as yet unformed and unfocused, which relates the treatment of the claimant's allegation of sexual harassment to the decision to dismiss her.
29. It is not for the Tribunal to assist the claimant to formulate her claim, nor is it for the Tribunal to give her legal advice.

30. However, the purpose of this Hearing was to determine whether or not the claim should be dismissed under Rule 27 of the Rules of Procedure. In my judgment, it is plain that the claimant's claim of unfair dismissal under section 94 of the Employment Rights Act 1996 must be dismissed for want of jurisdiction, in terms of section 108(1) of the Act.

31. To dismiss the claimant's claim in total would, in my view, risk falling into error by failing to clarify the claimant's claim of "sexual harassment". It may be that the claimant is unable to present a stateable claim to the Tribunal under the Equality Act 2010, but there is no doubt that the original claim set forth references to the 2010 Act and to sexual harassment. It is not in the interests of justice, nor consistent with the overriding objective of the Employment Tribunal, to dismiss the whole claim without allowing the claimant the opportunity to present her claim of sexual harassment in a form which allows the Tribunal to decide whether or not it is a stateable claim, in respect of which the Tribunal has jurisdiction.

32. I am therefore ordering the claimant to provide further specification of her claim relating to sexual harassment within 14 days of the date of this Hearing, and the Order is set out at the conclusion of this Note.

33. Once the claimant's further specification is received, the respondent will be given the opportunity to respond and comment on it, and the Tribunal will then determine whether the claim should be allowed to proceed further.

34. It may be that at that stage a further Preliminary Hearing should be listed in order to determine matters, but a decision on that will be taken by the Tribunal following receipt of the further correspondence herein ordered.

35. There being no further matters raised by the parties, the Hearing was concluded.

CASE MANAGEMENT ORDER

Under Rule 34 of the Employment Tribunals Rules of Procedure 2013, the Employment Judge now issues the following order:

1. **By no later than 4 September 2023, the claimant shall set out in writing, to the Tribunal and to the respondent, details of the claim which she wishes to make under the Equality Act 2010.**
2. **In doing so, the claimant shall identify:**
 - 5 • **the section of the Act under which she makes her claim;**
 - **what act or acts she maintains amounted to unlawful discrimination on the grounds of sex, or sexual harassment;**
 - **the basis upon which she argues that the respondent was responsible for those actions; and**
 - 10 • **the basis upon which she argues, if she does, that the act of dismissal amounted to a discriminatory act.**
3. **The respondent shall have until 11 September 2023 to respond to such further particulars, if so advised.**

Notes

- 15 (1) **You may make an application under Rule 29 for this Order to be varied, suspended or set aside. Your application should set out the reason why you say that the Order should be varied, suspended or set aside. You must confirm when making the application that you have copied it to the other party and notified them that they should provide the**
20 **Tribunal with any objections to the application as soon as possible.**
- (2) **If this order is not complied with, the Tribunal may make an Order under Rule 76(2) for expenses or preparation time against the party in default.**
- (3) **If this order is not complied with, the Tribunal may strike out the whole**
25 **or part of the claim or response under Rule 37.**
- (4) **Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.00.**

Employment Judge: M MacLeod
Date of Judgment: 21 August 2023
Entered in register: 22 August 2023
and copied to parties

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15 I confirm that this is my amended Judgment in the case of Collier v West Lothian
Leisure, and that I have signed the amended Judgment electronically.

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