EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000051/2023

Held at Aberdeen on 21 July 2023

Employment Judge J M Hendry

Ms M Pirie	**Claimant** **In Person**
Orka Artisan Café Ltd	**1st Respondent** **Represented by** **Ms J Veimou,** **Peninsula**
HR Services Scotland Limited	**2nd Respondent** **Represented by** **Ms K Beattie,**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claims against the Second Respondent having no reasonable prospects of success are struck out.

REASONS

E.T. Z4 (WR)

1. The claimant in her ET1 sought findings that she was unfairly dismissed and discriminated against on the grounds of disability and sex. She also indicated that she was making a whistleblowing claim. The claimant in her ET1 claims that she brought to her employer's attention some health and safety issues in relation to the café in which she worked and as a consequence she was dismissed. In relation to the second respondent she writes this:

"…… *HR Services Scotland who sacked me. I tried to give them all the evidence and explained that they perhaps did not have the full story.*"

2. The first respondents defended the claim on the basis that the claimant was not entitled to raise a claim for unfair dismissal as she had less than two years' service. They denied the financial basis of the claim. The second respondent defended the proceedings on a number of grounds pointing out that the claimant had provided an incorrect ACAS Conciliation number in her ET1. They also stated that they were not the claimant's employers claiming that they were a consultancy providing HR employment law and health and safety services. Their position was that they had been wrongly included as a party in the proceedings. They accepted that they had been engaged by the first respondent and instructed to carry out termination of the claimant's employment. They stated that they were not aware of any qualifying protected disclosure that time and acted as instructed.

3. The case proceeded to a preliminary hearing for case management purposes following which a Note was issued to parties on 11 May 2023. The claimant was given 21 days to consider her position after it was pointed out to her that claims against the second respondent did not appear well-founded. The Note read:

"*I once more re-iterate to the claimant that I have some considerable sympathy for the difficulties that she faced and I can understand her focus on the second respondents as being the company that actually dismissed and the "face" of her employers. I explained to the claimant that although I had every sympathy with her in relation to the health and personal difficulties she*

had experienced, if she pursues her claim with no prospects of success this can lead to an application for expenses being made against her by the second respondent. As stated above, I struggled to discern any direct claims against them and certainly none, as yet have been properly articulated."

4. Following the issue of the Note the claimant either wrote to the Tribunal or copied the Tribunal into considerable volume of correspondence that she was involved in relating to various matters. She did not seek to withdraw the claim against the second respondents.

Strike Out Application

5. On 26 June 2023 the second respondent's solicitors sought strike-out of the claims.

6. I am not going to rehearse the correspondence that went back and forth in the run up to the hearing on the 21 July. The claimant had sought a postponement because of her mental health difficulties and because she intended becoming an involuntary in-patient for a period in a local hospital. There was an exchange of correspondence in which the claimant was advised that she had a right to attend the hearing personally. I was not minded to postpone the hearing. Ultimately the claimant agreed that the hearing should proceed "on the papers" in other words on the basis of written submissions which would mean that she would not have to attend the hearing.

7. In advance of the hearing the respondents prepared a PH bundle with the relevant documentation. This had been copied to the claimant by e-mail on 20 July. I was conscious of the fact that the claimant was a party litigant. I noted that she lodged no commentary on the actual strike out application. Accordingly, I asked the Clerks to write to the claimant asking whether she had any intention of lodging submissions/arguments in relation to the strike-out application over above the correspondence that she already copied to the Tribunal. I gave the claimant 7 days to respond to this.

8. The solicitor acting for the second respondent set out their submissions in a separate document which had been lodged referring back both to the Note and to the original strike-out application. Their primary position was that the second respondent should be removed as a party to the proceedings under Rule 34 of the Employment Tribunal Rules of Procedure 2013 as they had been wrongly included by the claimant. There could be no claim against their clients as they were not the employers. They alternatively submitted that the claims had no reasonable prospects of success under Rule 37(1)(a). As a further alternative, they submitted that the claims against the second respondent should be struck out under Rule 37(1)(b) as the manner in which the proceedings had been conducted by the claimant had been scandalous, unreasonable and vexatious. They pointed to the volume of correspondence they and their clients had received. They indicated that the correct ACAS Early Conciliation Certificate was wrong on the ET1 and that the claims should be struck out under Rule 10(1)(c) or 12(1)(f).

9. The factual background does not appear to be in dispute in that the claimant was employed by the first respondent and not at any point by the second. The second respondent, as a consultancy business, acted as agents for the first respondent and acted in this capacity when they ended the claimant's employment. They were not independent actors.

10. The claimant made contact with the second respondent on 26 October 2022 enquiring whether she had been dismissed because of hygiene concerns. The second respondent confirmed they did not know about any alleged disclosure. Following her dismissal the claimant repeatedly contacted the second respondent.

Discussion and decision

11. Rule 37(1)(a) and (b) of the Employment Tribunal Rules is in the following terms:

"***Striking out***

37.—(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;

(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;"

12. Rule 2 (the overriding objective) is in the following terms:

"***Overriding objective***

2. 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."

13. In general a Tribunal has to be slow to strike-out an application where the central facts are in dispute (***North Glamorgan NHS Trust v. Ezsis*** [2007] IRLR 603 and ***Mbusia v. Cygnet Health Care Ltd*** EAT 0118/18 that strike-out draconian steps should be taken in exceptional cases but that there was no absolute bar to striking out such cases.

14. The respondent's agents brought to my attention the comments of HHJ Taylor in ***Cox v. Adecco*** [UKEAT/0339/19/AT]: "*No one gains by truly hopeless cases being pursued to a hearing*."

15. In the present case the difficulty the claimant faces is that she was not employed by the second respondent. In general, employment legislation protects an employee vis-à-vis their employer's actions. It is with the employer that the employment relationship is made. It was clear in this case that the second respondent are not the employers and that that they acted as agents for those employers in terminating the claimant's employment. The claimant agreed that it was suggested to her at the preliminary hearing and has not subsequently been contested. They had no obligation to discuss the matter with the claimant beyond what the employers asked them to do.

16. In the Note I had raised with the claimant that in certain circumstances in terms of section 47E of the Employment Rights Act an agent can be responsible for acts of detriment following the making of a protected disclosure. The claimant does not indicate that the respondents were aware or should have been aware that the claimant had made a whistleblowing disclosure. Indeed, the respondents' position is that at the time the nearest the claimant came to indicating that she had made a whistleblowing disclosure was, she asked whether she was being dismissed for raising health and safety concerns.

17. I had regard to the fact that the claimant was asked to set out the basis of any claim she might have under section 47B. She did not do so. Nevertheless, I will examine the matter in more detail.

18. Section 47B(1)(a) affords a worker the right not to be subjected to a detriment by the agent of the employer. As a defence to a claim under section 47B(1)(a) the agent can show that they subjected a claimant to a detriment in reliance of a statement by the employer that the act or omission would not amount to a contravention of the Employment Rights Act. The sequence of events is important here. It appears from the claimant's own ET1 it was only after HR

Services Scotland dismissed the claimant that she tried to give them her side of the story and explained they perhaps did not have the full position. They had been asked to terminate the claimant's employment on the grounds of her misconduct.

19. The claimant recorded a call with the second respondent's HR Director, Kerry Hislop on 2 November. A transcript of this was produced. The claimant begins by saying: "*I know you told me not to contact you again but I am having no luck with Louis and Garry….*" . The HR Director then discussed the claimant's behaviour and made reference to her claimant trying to phone them and e-mailing them 32 times.

20. It appears to me that the claimant has failed to present any facts which amount to a *prima facia* case of sex or disability discrimination relating to the second respondent. She was not employed by the second respondent. The only possible claim would be a claim for detriment under Section 47(1)(a). The claimant does not suggest from the paperwork that the respondents were aware that she had made a qualifying disclosure and it seems that she raised these matters with them only after she had been dismissed. There are however further difficulties.

21. The respondents' position was that they were not engaged as an agent in the sense envisaged by section 47B. They had no autonomous decision making power. The section is to protect employees treated badly by what could be described as commercial agents. The respondents' refer to the case of ***Ministry of Defence v. Kemeh*** UKEAT/0249/12/SM which determined that the common law principles of agency must apply in order for true agency relationship to be made out. In brief the parties must engage in a commercial relationship where a person, the agent, is expressed as authorised to act on behalf of a principal and enter into a legal relationships and take decisions for them. That is not the situation here.

22. I am led to the conclusion that any claim under this section made by the claimant or for automatically unfair dismissal has no reasonable prospect of success and should be dismissed on this ground alone.

23. In relation to the other grounds for strike-out. I need not determine them.

24. Finally, I would observe that I am conscious that the claimant as both a party litigant and someone who has a number of personal difficulties wanted to advance her case against those involved. I warned her that repeatedly contacting the second respondent would be unreasonable behaviour and lead to either strike-out of the case or possibly a finding for expenses. I noted that on 26 April 2023 Judge Hosie instructed the Clerk to write to parties quoting: "*As all the relevant issues will be discussed at the hearing.* ***Judge Hosie directs the parties to immediately desist from e-mailing the Tribunal concerning the merits of the claim and the conduct of anyone involved in the claim. In so far as relevant to the issues in this case this will be discussed at the hearing.***"

25. There were other examples of the claimant being asked not to send repeated emails to the parties or to the Tribunal. It was explained to her that this was time consuming and posed problems for all concerned as each email had to be read by the Clerks or by the respondents' solicitors. I would nevertheless have been reluctant to strike out on the grounds of unreasonable behaviour without having given the claimant a further opportunity on pain of strike out to modify this behaviour. This at the end of the day had not been necessary.

Employment Judge: **J M Hendry**
Date of Judgment: **31 July 2023**
Date Sent to Parties: **31 July 2023**