



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Sonja Mirkovic

v

NHS North West London ICB

Heard at: London Central (by CVP)

On: 1 August 2024

Before: Employment Judge Lewis

Representation

For the Claimant: Representing herself

For the Respondent: Mr A Ross, Counsel

PRELIMINARY HEARING JUDGMENT

1. The claim for unfair dismissal is struck out as having no reasonable prospect of success.
2. The claim for breach of contract is struck out as having no reasonable prospect of success.
3. There are no other claims.

REASONS

The claims and issues for the preliminary hearing.

1. The respondents make an application to strike out the claims on grounds that they have no reasonable prospect of success or alternatively to order a deposit on grounds that they have little reasonable prospect of success.
2. The claimant brought a claim for 'declined contract of employment following a job offer after a successful interview'. She also ticked the box for unfair

dismissal. When I explained that she needed two years' service to claim unfair dismissal, she said that was the nearest box to what she wanted to say.

3. Other than unfair dismissal, which she is not eligible to claim, the claim fits into the category of breach of contract. Such a claim can only be brought in an employment tribunal under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Under this, it is necessary to be an employee and for the claim to arise or be outstanding on the termination of the employee's employment.
4. After I drew to Mr Ross's attention the case of Sarker v South Tees Acute Hospitals NHS Trust [1997] IRLR 328, he agreed that the 1994 Order can potentially cover a situation where an employee agrees a contract of employment to start a new job, but the job offer is withdrawn before the start date.

The law

5. Under Schedule 1, rule 37(a) of the ET Rules of Procedure 2013, the tribunal can strike out all or part of a claim on the grounds (amongst others) that it has no reasonable prospect of success.
6. Striking-out is a draconian step and not to be taken lightly. Tribunals need to be even more careful where the claimant is without legal representation. Guidance on when it is appropriate to strike out, particularly with a litigant-in-person- was given by the EAT in Mbuisa v Cygnet Healthcare Ltd EAT 0119/18 and more recently in Cox v Adecco Group UK & Ireland and others [2021] ICR 1307.
7. Under Schedule 1, rule 39 of the ET Rules of Procedure 2013, if a tribunal at a preliminary hearing considers that any allegation or argument in a claim has little reasonable prospect of success, it can order the claimant to pay a deposit up to £1000 as a condition of continuing to advance that allegation or argument. The tribunal must make reasonable enquiries into the claimant's ability to pay and take account of any information obtained in that respect when deciding the amount of the deposit.
8. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim for breach of contract can be brought by an 'employee' if the claim 'arises or is outstanding on the termination of the employee's employment'. The case of Sarker v South Tees Acute Hospitals NHS Trust [1997] IRLR 328 talks about the position if an individual has entered a contract of employment, but the job offer has been withdrawn before the start date.
9. In Ms Sarker's case, she applied for and was offered a post as ultrasound manager with the Trust. She was sent a formal letter of appointment attaching a document setting out the particulars of employment. Both the letter and the particulars referred to a start date of 1 October. Before she started, for reasons I do not need to get into, she was told the Trust was withdrawing its offer. She made a claim for damages for breach of contract under what was then called

the Industrial Tribunals Extension of Jurisdiction Order 1994. The EAT said that the definition of 'employee' includes someone who has entered a contract of employment, even if they have not actually started performing their duties. If the contract is terminated before they start, they can claim breach of contract under the 1994 Order.

Facts

10. The facts I set out here are what is stated in the key documents shown to me, together with the claimant's own evidence.
11. On 21 October 2022, the claimant signed a contract with the Imperial College Healthcare NHS Trust Staff Bank. The confirmation email dated 21 October 2022 said the A&C Booker Lucy would arrange staff placements for the claimant. This was Lucy Willmott. The contract says that timesheets must be submitted and the claimant would be paid weekly for her shifts, usually Friday in arrears.
12. On 23 May 2023, Chats Malalasena, the Programme Management Office Lead at the respondent emailed the Imperial College Bank as well as the Chelsea and Westminster Hospital NHS Foundation Trust Bank asking if there were 'available bank staff who will be suitable for the attached role specification and its associated JD'. The heading of the email is 'Staff Bank Staff Availability for Band 5/6 Admin-Project Support Role'. This is the role in question.
13. On 24 May 2023, Ms Willmott emailed Mr Malalasena to say she had spoken to a candidate who was very excited. Mr Malalasena suggested a brief informal interview with him and his line manager, Mike Martin. On 31 May 2023, Mr Malalasena emailed Ms Willmott to say the candidate had withdrawn and to ask if Ms Willmott had any other suitable candidates.
14. On 1 June 2023, the claimant emailed Ms Willmott to say, 'Hope all's well – I am better now and ready to return to work, please let me know if you have any assignments available'. Ms Willmott replied with two roles. Then shortly after she sent another email: 'I have just had the role below become available, it is a project support role but they are looking for an experienced PA as the role is very similar please let me know if you are interested?' The claimant said that she was and asked for her application to be put forward.
15. Later that day, Ms Willmott emailed Mr Malalasena with the claimant's CV. Mr Malalasena then replied to say the claimant's CV looked very suitable. He asked if the claimant could meet him and Mr Martin for 30 minutes informally over Teams. He said 'We are were very keen to speak with Sanja and if all goes well, then for Sanja to start work at the NKR Team at the earliest opportunity. It may take a week or two to get the IT requirements set up'.
16. A meeting was arranged for the next day. On 2 June 2023, Mr Malalasena sent an email to Ms Willmott headed 'Outcome & next steps following meeting with Staff Bank Member – Ms Sonja Mirkovic'. The relevant parts of the email state:

'May I confirm in writing that Mike and I met with Sonja at 10 am today over MS Teams, and we felt Sonja will be very good to support the NKR programme and that message was conveyed to her. Sonja was delighted and accepted the offer. We advised her that next steps will be for us to liaise with you and get IT accounts set up etc Understood your advice re the Bank Staff roster we need to access at the ICB ... Once accessed, Mike and I need to pass Sonja's shifts for the NKR role, through there May I please seek below two things from you ... Would you kindly confirm that Sonja Mirkovic is employed by the North Kensington Recovery (NKR) team of the NHS WNL ICB from ICHT Staff Bank as a Bank staff member, for the Business and Project Support Officer role? This confirmation will be needed by our IT department, when we request the IT accounts for Sonja.'

17. Ms Willmott emailed the claimant on 2 June 2023 to say: 'I have just spoken with Chats and he has said they would love to offer you the role and he will be in touch regarding your start with them, he said he will contact you and arrange everything with you directly. I will need to submit a band change to band 6 so if you can confirm once you have a start date and I will get that sorted it may take a couple of weeks to action but you will be paid a band 5 until actioned, and the difference will be backdated.'
18. The claimant replied to Ms Willmott: 'Thank you – Monday is as good as any!'. There was no response to that suggestion.
19. The claimant expected Mr Malalasena to be in touch shortly with a start date the next week and the contract to run to its end on 31 March 2024.
20. It is undisputed that it then went quiet.
21. On 21 June 2023, the claimant emailed Mr Malalasena: 'Following our interview on 2 June I had a message from Lucy saying that you'd be happy to offer me the role and will be in contact directly – I am looking forward to hearing from you'.
22. There was no reply. The claimant made a few efforts to get in touch with Mr Malalasena and Mr Martin without success. On 4 July 2023, she contacted Kevin Croft at the Imperial Bank. She said she was suffering financial adversity 'all on a premise (promise) of the above role! There is now more than four weeks that I have not heard from people who had committed themselves to me starting the role – I have tried to contact the to no avail – there was a clear advert stating a year's contract until April 2024 – I was offered a job on 2 June – so far I have heard nothing!'
23. Mr Croft immediately approached Denise English, Deputy Director of HR at NKR. This eventually led to an explanation. In essence, Mr Malalasena and Mr Martin said they had initially been told internally that they could use the Bank, but it had then turned out that they could not process the claimant's placement because Bank booking systems with Imperial were not in place. They could not now appoint the claimant on a direct fixed-term contract because she did not

meet the essential criteria for the post and anyway the job had not been properly advertised. Also, while they were internally liaising regarding the Bank arrangements, the respondent had told staff that 30% savings had to be made and there would be a revised staffing structure.

24. This summary of the reasons for not getting back in touch with the claimant is simply a rough record of what the emails say. I make no fact-findings on what the respondent's reasons actually were, because it is not my role at this preliminary hearing to make findings on anything which the claimant disputes and which is not clear-cut.
25. Mr Malalasena spoke to the claimant on 27 July 2024 and emailed her the same day apologising for the long delay in replying and providing an explanation.
26. The claimant requested compensation. On 30 August 2023, Ms English emailed the claimant. She said the respondent could not pay compensation because there was no documentation, confirmation of appointment or start date had been agreed with the claimant by the NKR team.
27. As for what the claimant had understood when she had the interview and when Ms Willmott conveyed the outcome, the claimant's focus is understandably on the fact that she was offered a post and then heard nothing for two months – she says she was 'ghosted' – and she lost other opportunities as a result. She was vague as to whether she believed the offer was as a Bank placement or a direct permanent post. She eventually said to me that she originally thought the post was a Bank placement, but then she thought it was a contract. I do not know if that is actually what she thought at the time. I make no fact-findings. But for the purpose of my decision today, I will take her case at its highest and assume that is what she did indeed think.
28. I asked the claimant whether she was saying she was offered the post or told a start date by Mr Malalasena or Mr Martin at the interview or directly by them. She said not. She was relying on the email from Ms Willmott on 2 June 2023 (see above).

Conclusions

29. I strike out the claim for unfair dismissal. The claimant is not eligible to make such a claim. She did not have a minimum of two years' continuous service.
30. The real question is whether the claimant has little or no reasonable prospect of success in her breach of contract claim. I am conscious that striking out is a draconian step and in general, I must take the claimant's case at its highest. If any other than the most obvious fact-findings are needed, that usually requires a hearing and evidence.
31. However, there does have to be some basis for what the claimant is saying. The test is whether there are no 'reasonable' prospects of success.

32. I cannot see any reasonable prospects of success in the claimant showing that she was ever an employee of the respondent. There are several reasons for this.
33. One reason is that the documents overwhelmingly show the offer was for a placement as a Bank worker (as opposed to the position of an employee under a contract of employment with the respondent). The initial approach by the respondent in Mr Malalasena's email of 23 May 2023 was to two Bank providers and was headed 'Staff Bank Staff Availability'. The 2 June 2023 email from Mr Malalasena to Ms Willmott talks about getting IT accounts set up and accessing the Bank Staff roster, and requires Ms Willmott to provide confirmation for the IT department that the claimant was employed by the respondent 'as a Bank staff member for the Busi and Project Support Officer role'. When passing on the offer to the claimant by email on 2 June 2023, Ms Willmott tells the claimant that she [ie Imperial] needs to submit a band change.
34. So while the emails suggest that the role was offered, they do not show that the position was as a direct employee of the respondent as opposed to a Bank placement. The claimant does not say there was any direct oral communication with her by the respondent with the offer.
35. The claimant argues that the fact that Mr Malalasena and Mr Martin were to get in touch with her direct to arrange the start date means that she had a direct contract with them. I do not think it necessarily means that. It is equally consistent with a lengthy Bank placement, where practical arrangements are made directly between the worker and the end-user.
36. My second reason for believing there is no reasonable prospect of success in showing the claimant was ever an employee of the Trust is that there was no concluded contract of employment between the claimant and the respondent. She had not been provided with any contract of employment to sign and no start date had been agreed. The claimant's case relies on an email from Ms Willmott which states 'I have just spoken with Chats and he has said they would love to offer you the role and he will be in touch regarding your start with them, he said he will contact you and arrange everything with you directly'. The claimant replied to Ms Willmott: 'Thank you – Monday is as good as any!' and she subsequently chased up. I cannot see how it can be successfully argued that this was a concrete offer and acceptance of a contract of employment. I do not think there is any reasonable prospect of success in showing on this basis that a concluded contract of employment was agreed between the claimant and the respondent and that the claimant was ever an employee.
37. The claimant is focussed on the unfairness of the respondent making an offer and then 'ghosting' her, as she puts it for several months instead of telling her sooner that the offer was withdrawn. I can see why she is very upset by this lack of communication, especially if it cost her other opportunities. I can also see why she is upset that the respondent was shambolic regarding its Bank procedures. But I have to answer a different question. Which is whether technically there is any reasonable prospect of her succeeding in her argument

that a contract of employment had been made between her and the respondent in the first place. I just cannot see any reasonable prospect of her succeeding in such a claim.

38. For this reason I also strike out the claimant's contract claim as having no reasonable prospect of success.

Employment Judge Lewis

8 August 2024

Sent to the parties on:

14 August 2024

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For the Tribunals Office