



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 8000116/2022

Public preliminary hearing held in Edinburgh in person on 4, 5 & 6 June 2025

10

Employment Judge McCluskey

L Finlay

15

**Claimant
In person**

20

Fife Health Board

**Respondent
Represented by:
D James
Advocate**

25

30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

35

The Tribunal has no jurisdiction to consider a complaint of unfair constructive dismissal (section 95(1)(c) ERA) arising from the claimant purporting to resign on 13 June 2022. Her effective date of termination of employment was 5 June 2022. The complaint of unfair constructive dismissal is dismissed.

REASONS

Introduction & issues

1. The claimant submitted her ET1 claim form on 19 October 2022. At a case management preliminary hearing on 16 December 2022 before EJ d’Inverno the claimant clarified that she brought complaints of unfair constructive dismissal, age discrimination, notice pay, holiday pay and arrears of pay.
2. It was recorded in the order and note from that case management hearing that there were various preliminary matters including whether the Tribunal has jurisdiction to consider the claimant’s complaint of unfair constructive dismissal, given the respondent’s position that the claimant had been given notice of the termination of her fixed term contract on its expiry date and that the claimant had subsequently resigned during that period of notice. Reference was made to section 95(2) ERA.
3. The case was listed for public preliminary hearing to determine (i) time bar in relation to the complaints of age discrimination, notice pay, holiday pay and arrears of pay and (ii) jurisdiction in relation to the complaint of unfair constructive dismissal.
4. A public preliminary hearing took place on 16 March 2023 and 11 May 2023 before EJ Porter. It was decided and recorded in the judgment issued following the hearing that the issue of jurisdiction in relation to the complaint of unfair constructive dismissal would not be determined at that hearing as parole evidence was necessary in relation to the claimant’s contractual arrangements with the respondent which was not available at that hearing. At the hearing the Tribunal determined the time bar issue and decided to strike out the complaints of age discrimination and arrears of pay (in respect of the ANNP banding shortfall) as those complaints were time barred. The claimant appealed against the strike out decision. The respondent cross appealed against the decision not to determine the unfair constructive dismissal jurisdiction issue at that hearing. On 5 November 2024, the claimant’s appeal and the respondent’s cross appeal were both dismissed.

5. Thereafter, the Tribunal listed a case management preliminary hearing, which took place on 13 March 2025 before me. As recorded in the order and note of that hearing the claimant clarified again, after discussion, that in relation to dismissal her complaint was one of unfair constructive dismissal. She clarified that her position was that she had resigned before notice of termination of her employment had been given by the respondent and that the Tribunal therefore has jurisdiction to consider her complaint of unfair constructive dismissal.
6. In her ET1 the claimant had set out a considerable number of allegations over a long period of time culminating in, as asserted by the claimant, her unfair constructive dismissal.
7. Given the number of allegations and the time period, starting in around 2004, a public preliminary hearing was listed to take place on 4, 5 & 6 June 2025 to determine the preliminary issue of whether the Tribunal has jurisdiction to determine the claimant's complaint of unfair constructive dismissal. A determination of this issue as a preliminary matter was considered to be in accordance with the overriding objective.
8. The claimant gave evidence. The following witnesses gave evidence on behalf of the respondent: Lynnette MacKenzie – Clinical Nurse Manager and the claimant's line manager; Donna Galloway – General Manager, Women, Children and Clinical Services Directorate; and Anne- Louise Muir – HR Advisor for Redeployment.
9. There was a joint file of productions extending to 332 pages. I reminded parties that I would only read documents to which I was taken during the evidence of the witnesses. There was a statement of agreed facts in the bundle which had been prepared for the public preliminary hearing in 2023. I was not taken to this document and have not referred to the contents of this document in my findings in fact. Neither party invited me to do so.

10. Several days before the hearing the claimant sent the respondent and the Tribunal a document called “skeleton argument 4-6 June 2025”. There had been no case management order to do so. The document extended to 6 pages.

5

11. This document was not treated as the claimant’s evidence in chief as no witness statements had been ordered. The claimant clarified that she had updated the document since it had been sent to the respondent and the Tribunal. I did not receive the updated document, but it was agreed that the claimant could refer to this updated document when giving her oral evidence in chief. The respondent had no objection to this.

10

12. The claimant clarified, in accordance with the skeleton argument that she had prepared, that she no longer relied upon her “first resignation” on 20 May 2022 as the basis of her unfair constructive dismissal complaint. Instead, she relied on a “second resignation” on 13 June 2022. It was agreed that the issue for determination at this hearing was whether the Tribunal had jurisdiction to determine a complaint of unfair constructive dismissal, the claimant relying upon a “second resignation” on 13 June 2022.

15

20

Findings in fact

13. I made the following essential findings in fact, from the evidence led by parties.

25

14. The claimant commenced employment with the respondent in 2004. On 30 September 2019 the claimant retired but returned to work for the respondent on 5 October 2019. There was no break in the claimant’s continuity of employment.

30

15. From 5 October 2019 until the end of her employment the claimant worked on successive fixed term contracts. There was no break in the claimant’s continuity of service between her successive fixed term contracts.

16. On 29 Jul 2021 the claimant was appointed to a fixed-term contract to cover a period of maternity leave within the respondent's neonatal unit. The contract was for a fixed term until 30 April 2022, when the post-holder was due to return from maternity leave.

5

17. On 12 April 2022, Ms Donna Galloway - General Manager, Women, Children and Clinical Services Directorate wrote to the claimant. In her letter Ms Galloway wrote *"As you know, your fixed term appointment to the post of Advanced Neonatal Nurse Practitioner is due to expire on 30 April 2022.....If you have not secured an alternative post prior to the end of your notice period, your employment will be terminated..... It is therefore my decision to confirm that your last day of work with NHS Fife will be 30 April 2022. The reason for this decision is that the substantive postholder is returning from their period of maternity leave"*.

10

15

18. The respondent placed the claimant on its redeployment register from 11 April 2022. Ms Lynette MacKenzie, the claimant's line manager, told the claimant she would be on the respondent's redeployment register until 30 April 2022.

20

19. On 27 April 2022 Ms MacKenzie emailed the claimant to her work email address. She wrote *"We have agreement to extend your contract until June 5th to enable you to have 8 full weeks on the re-deployment register Is that something you would like?"* The claimant emailed back the following day from her work email address and wrote *"Yes that would be good thanks"*.

25

20. The substantive post holder returned from their period of maternity leave around end April 2022.

30

21. In May 2022 the claimant had a period of annual leave. She was due to return to work on around 16 May 2022. The claimant did not return to work after her annual leave.

22. On 20 May 2022 the claimant sent an email from her personal email address to Ms Sinclair-Forrow who worked in the respondent's HR team. Her email

was headed "*Resignation*". The claimant wrote "*It is with great sadness that after more than 18 years service in the SCBU I feel I need to tender my resignation from my post as an ANNP. (Please forward this to the manager it should best go to).*" The claimant made allegations of bullying and harassment in her email. The claimant did not return to work after sending this email.

5

10

23. On 29 May 2022 Ms Galloway replied to the claimant by email. She wrote "*I received notification of your resignation and would be keen to discuss the concerns that you raise...*".

15

24. On 2 June 2022 the claimant replied to Ms Galloway by email from her personal email address. The claimant said that she had discussed the issues with different managers over the years and was "*sceptical that meeting with another manager from the same directorate will make a difference*". The claimant did not agree to discuss her concerns with Ms Galloway.

20

25. Ms Galloway replied by email on 2 June 2022. She wrote "*Thanks for getting back to me Lorna. Please be assured that the issues raised will be investigated. Let Dawn know if you wish to meet regarding your resignation*".

26. Ms Galloway heard nothing further from the claimant until 8 June 2022.

25

27. On 8 June 2022 the claimant emailed Ms Galloway from her personal email address. She wrote "*I will arrange with Dawn to meet with you to discuss the issues I raised in my letter*". She asked to bring a companion who worked elsewhere in the NHS.

30

28. On 9 June 2022 Ms Galloway replied by email. She wrote "*As we have not yet accepted your notice (hence why we are offering the opportunity to meet), any support would need to be a current member of NHS Fife staff or a staff side representative. Just to be clear, this meeting is to discuss your resignation and to provide you with an assurance that your concerns will be fully investigated by a manager who does not sit within our services – it is not*

about discussing the details of the complaint. The intention is to ask what could be put in place to enable you to continue to work”.

5 29. On 9 June 2022 Anne-Louise Muir, HR Advisor for Redeployment sent an email to the claimant to her personal email address. She wrote “*The redeployment group have identified a post they think we should explore for you*”. The post was in Infections Control. The claimant replied the same day saying she was not sure she was a good fit but she would discuss the post with the recruiting manager.

10

30. On 13 June 2022, the claimant met with Ms Galloway. The claimant’s trade union representative was also in attendance. Later the same day the claimant emailed Ms Galloway from her personal email address. She wrote “*I have considered all the points made in the meeting and had a chat with the manager at infection control as advised by redeployment.....However I still feel traumatised by all the events and the failure to deal with them by managers in the workplace...Therefore I will not be withdrawing my resignation.*”

15

20 31. On 14 June 2022 Ms Galloway wrote to the claimant. She wrote “*Thank you for meeting with me on 13th June 2022 to discuss your resignation letter which was received on 20th May 2022....The meeting was convened to give you an opportunity to reconsider your resignation and I asked what could be put in place to enable you to continue to work.... Unfortunately after reflection you emailed me to inform me that you would not be reconsidering your decision and that your resignation still stands*”.

25

30

32. The claimant submitted a fitness for work certificate dated 1 July 2022 signing her off work for the period from 16 May 2022 to 5 June 2022.

33. The claimant was paid by the respondent until 5 June 2022. Her p45 issued by the respondent records the last date of her employment as 5 June 2022.

Observations on the evidence

34. This judgment does not seek to address every point upon which the parties have disagreed. It only deals with the points which are relevant to the issues I must consider, to decide whether the Tribunal has jurisdiction to consider the claimant's complaint of unfair constructive dismissal. If I have not mentioned a particular point, it does not mean that I have overlooked it. It is simply because it is not relevant to the issues.

35. The standard of proof is on balance of probabilities. This means that if I consider that, on the evidence, the occurrence of an event was more likely than not, then I am satisfied that the event in fact occurred. Likewise, if I consider that, on the evidence, an event's occurrence was more likely not to have occurred, then I am satisfied that it did not occur.

36. There was no real dispute on the facts in this case, at least in terms of relevant communications between the parties. The issue to be determined, whether the Tribunal has jurisdiction to consider the complaint of unfair constructive dismissal, is essentially a legal one with reference to ERA and case law.

Relevant law

37. Section 95(1) Employment Rights Act 1996 (ERA) provides: "Circumstances in which an employee is dismissed.(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—(a)the contract under which he is employed is terminated by the employer (whether with or without notice),(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

38. Section 95(2) ERA provides : (2)An employee shall be taken to be dismissed by his employer for the purposes of this Part if—(a)the employer gives notice

to the employee to terminate his contract of employment, and(b)at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

39. Section 97(1) ERA provides: "Effective date of termination. (1)Subject to the following provisions of this section, in this Part "the effective date of termination"—(a)in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,(b)in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and(c)in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect."

Submissions

40. The claimant and the respondent both provided written submissions and made oral submissions in support of those. I carefully considered the submissions of both parties during my deliberations. I have dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts in reaching my decision. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Discussion and decision

Claimant's position

41. The claimant accepted that she had received the letter from Ms Galloway on 12 April 2022 confirming an end date for her employment on 30 April 2022.

She accepted that on 27 April 2022 Ms MacKenzie offered to extend her employment until 5 June 2022 and that on 28 April 2022 the claimant accepted this extension to 5 June 2022.

5 42. At this hearing, the claimant submitted that although she had emailed her resignation to the respondent on 20 May 2022 that was her “first resignation” and it was “null and void”. The claimant submitted that she now relied upon a “second resignation” which was the email which she sent to Ms Galloway on 13 June 2022 after their meeting when the claimant wrote “*Therefore I will*
10 *not be withdrawing my resignation*”. She submitted that email was a “second resignation” which ended her employment with the respondent on 13 June 2022. She relied upon section 95(1)(c) ERA asserting that she terminated her contract without notice on 13 June 2022, in circumstances such that she was entitled to terminate it without notice by reason of the respondent’s
15 conduct. She asserted that as at 13 June 2022 she was on an open-ended redeployment contract of employment with the respondent with no notice of termination of that contract of employment having been served by the respondent, thus section 95(2) ERA did not apply.

20 43. In order to advance the argument presented at this hearing, that she remained employed by the respondent until 13 June 2022 in an open-ended redeployment contract with no notice of termination by the respondent, she submitted that:

- 25 a. her “first resignation” on 20 May 2022 was “null and void” because it was not accepted by the respondent and both she and the respondent agreed to continue working together.
- b. the parties agreement to extend the date of termination of her employment to 5 June 2022 was “defunct” as parties had communicated with each other after that date.

30

Section 95(1)(b) ERA

44. The various statutory modes of dismissal are set out in section 95(1) ERA. They are mutually exclusive. An employee’s contract cannot be terminated in

three different ways. The claimant cannot complain that she was dismissed in terms of section 95(1)(c) ERA if, as a matter of fact, she was dismissed in terms of section 95(1)(a) ERA or section 95(1)(b) ERA.

5 45. Section 95(2) ERA operates where notice of termination of contract is given by the employer and the employee subsequently resigns. In such a circumstance, the reason for dismissal remains that in the notice given by the employer.

10 46. Firstly, I asked myself whether the claimant had been dismissed by the respondent by virtue of section 95(1)(a), (b) or (c) ERA.

15 47. The claimant was on a limited-term contract with an expiry date of 30 April 2022 when the substantive postholder was due to return from a period of maternity leave. Did that contract terminate by virtue of the limiting event without being renewed under the same contract?

20 48. I am satisfied that it did. The substantive postholder returned from maternity leave around end April 2022. The claimant's contract was not renewed under the same contract. It could not be renewed under the same contract as the substantive postholder had returned.

25 49. The parties agreed to an extension of the claimant's limited term contract from 30 April 2022 until 5 June 2022 to enable the claimant to be placed on the redeployment register so both parties could look for any other roles within the respondent which the claimant could perform. This was not a renewal under the same contract. It was an extension of the existing limited-term contract for a short period until 5 June 2022. Parties can agree to postpone the date of termination, even after notice has been given. Such agreement does not
30 necessarily supersede the reason for dismissal or termination of employment. The effective date of termination becomes the date on which the extended notice expires (*Mowlem Northern Ltd v Watson* 1990 ICR 751, EAT).

50. Accordingly, I am satisfied that the claimant was dismissed by the respondent in accordance with section 95(1)(b) ERA on expiry of her limited term contract, by virtue of the limiting event namely the substantive post holder's return. I am satisfied that the fact that there was an agreed short extension of the limited-term contract to 5 June 2022 so the claimant could be placed on the redeployment register does not change the circumstances in which the claimant was dismissed by the respondent and accordingly the reason for the claimant's dismissal falls within the ambit of section 95(1)(b) ERA.

51. The claimant's purported resignation on 13 June 2022, upon which she relies, was after 5 June 2022. Her employment had already ended before 13 June 2022.

Section 95(1)(a) ERA

52. If I am wrong about that, I next considered whether the claimant's dismissal fell within the ambit of section 95(1)(a) or section 95(1)(c) ERA.

53. I concluded that if the claimant's dismissal did not fall within the ambit of section 95(1)(b) ERA then it fell within the ambit of section 95(1)(a) ERA. If the result of the extension of the claimant's employment from 30 April 2022 to 5 June 2022 was that she was no longer employed under a limited-term contract which terminated by virtue of the limiting event, then I am satisfied that she was dismissed by the respondent on 5 June 2022, having been given notice on 27 April 2022 of the termination of her employment on 5 June 2022.

54. The claimant, as I understood it, submitted that the email of 27 April 2022 did not give notice of termination of her employment on 5 June 2022 as it did not use the word "dismissal". I am satisfied that there was no requirement for it to do so. The wording clearly refers to extending her contract "until June 5th" in circumstances where the claimant knew that otherwise her contract of employment would end on 30 April 2022. I am satisfied that the email was clear and unequivocal that her employment would end on 5 June 2022.

Section 95(1)(c) ERA

55. Next I considered the claimant's submission to this hearing that her dismissal fell within the ambit of section 95(1)(c) and that section 95(2) ERA was not triggered because: on 13 June 2022 she was employed by the respondent on an open ended contract with no end date; and on 13 June 2022 she terminated the contract under which she was employed in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct.

10

56. I do not agree with the claimant's submission. For the reasons already given, I am satisfied that the claimant's employment ended on 5 June 2022. She was not employed by the respondent on 13 June 2022 on any contract of employment. Thus, she could not elect to terminate any contract of employment on 13 June 2022 by reason of the respondent's conduct.

15

57. I considered the parties' interactions before 5 June 2022, relied on by the claimant. These were as follows: on 29 May 2022 Ms Galloway emailing the claimant about her resignation email of 20 May 2022 and saying she would be keen to discuss the claimant's concerns; the claimant's reply on 2 June 2022 saying that the claimant was sceptical that meeting with another manager from the same directorate will make a difference and Ms Galloway's reply the same day saying that the issues raised by the claimant will be investigated and to let her know if the claimant wanted to meet regarding her resignation, to which the claimant did not respond.

20

25

58. I am satisfied that there was nothing in the parties' interactions before 5 June 2022, such that the parties had agreed to postpone the date of termination of employment either to a date after 5 June 2022 or, as the claimant asserts, indefinitely. The only interaction was about Ms Galloway's proposal that they meet to discuss the claimant's concerns raised in her email of 20 May 2022. There was no mutual agreement before 5 June 2022 that impacted upon the effective date of termination of 5 June 2022.

30

59. The claimant also relies on the following interactions after 5 June 2022 as extending her employment indefinitely: on 8 June 2022 the claimant emailed Ms Galloway to arrange to meet to discuss the issues raised in her email of 20 May 2022; Ms Galloway's response to arrange the meeting and stating that the respondent had not yet accepted the claimant's resignation of 20 May 2022; the communication from HR on 9 June 2022 about a redeployment opportunity; and the claimant's email to Ms Galloway on 13 June 2022 after they had met, saying that she will not be withdrawing her resignation.

10 60. Notice, once given, cannot be unilaterally withdrawn or varied by either party (*Riordan v War Office 1961 1 WLR 210, CA*). This means that it cannot be unilaterally extended. Thus, where one party gives notice of termination to the other and a party subsequently seeks to extend the notice period without the agreement of the other, this will not delay the effective date of termination, which will remain the date on which the notice as first given expires. Accordingly, Ms Galloway was not able to unilaterally extend the claimant's employment beyond the agreed date of 5 June 2022 when she wrote that she did not accept the claimant's resignation.

20 61. Parties can agree to postpone the date of termination, even after notice has been given. The effective date of termination becomes the date on which the extended agreed notice expires (*Mowlem Northern Ltd* above). The claimant submits that there was an agreement to postpone the date of termination indefinitely, such that the claimant was on an open-ended contract with no termination date.

25 62. Although notice once given cannot be unilaterally withdrawn or varied it can, during the operational period of that notice, be extended by agreement. What cannot be done is for the parties to agree a retrospective effective date of termination, i.e. to agree a different date of termination (or as the claimant submitted, agree no date of termination) after the effective date of termination on 5 June 2022 has passed (*Willeys v Jennifer Trust for Spinal Muscular Atrophy EAT 0282/11*). That is what the claimant appeared to submit in so far as she relied on communications after 5 June 2022.

63. As already found, there was nothing in the parties' interactions before 5 June 2022, where the parties had agreed to postpone the date of termination of employment beyond 5 June 2022. The claimant was dismissed on 5 June 2022. Nothing which happened after 5 June 2022 can change that position. Accordingly, the claimant was not employed on any contract of employment after 5 June 2022 from which she could resign.

Conclusion

64. The Tribunal has no jurisdiction to consider a complaint of unfair constructive dismissal (section 95(1)(c) ERA) arising from the claimant purporting to resign on 13 June 2022. The claimant was dismissed in circumstances falling within section 95(1)(b) ERA. Her effective date of termination of employment was 5 June 2022. The complaint of unfair constructive dismissal is dismissed.

65. The claimant's remaining complaints are for unauthorised deduction from wages and holiday pay. The claimant has produced a schedule of loss setting out the amounts sought for these complaints and the relevant date period. The relevant date period is for purported wages and holiday pay accrued after 5 June 2022. It is difficult to see how those complaints can proceed given the finding that the claimant's employment terminated on 5 June 2022. The claimant indicated at the hearing that she wished to reserve her position on these complaints in the meantime until this judgment was received.