



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001997/2024 (V)

Held on 17 February 2025 and 2 April 2025

Employment Judge J M Hendry

Mrs J Fryer

**Claimant
In Person**

Highlands and Islands Airports Limited

**Respondent
Represented by,
Ms A Turnbull,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

- 1. The Employment Tribunal finds that the claim for breach of contract arising from a breach of an express term of the claimant's contract having no reasonable prospects of success is struck out.**
- 2. The Employment Tribunal finds that the claim for breach of contract arising from a breach of the implied duty of trust and confidence having no reasonable prospects of success is struck out.**
- 3. The Employment Tribunal finds that the claim for loss of wages having no reasonable prospects of success is struck out.**

E.T. Z4 (WR)

REASONS

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1. A hearing took place on 17 February 2025 in order to consider whether or not the claims should be struck out under Rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024 on the basis that they had no reasonable prospect of success if they should be subject to Deposit Orders.

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2. Prior to the hearing the respondents had lodged written submissions. They had also lodged a Joint Bundle of Documents. The hearing also had to consider an amendment proposed by the claimant.

15 Background procedure

3. The claimant was unable to raise proceedings for unfair dismissal or constructive unfair dismissal as she did not have two years qualifying service. Her ET1, which she lodged in late 2024, did not have the type and details of any claims "ticked". There was a narrative at Box 8.2 indicating that the claimant's job changed significantly from her job description and she had been given various reassurances that concerns she had would be resolved. One of these was her wish for greater remuneration for acting in a role that she had not been employed to do. The claimant alleged that HIAL had breached their contractual duty to treat her with respect and that she was "completely messed around". The claimant completed the ET1 herself. Although she is legally qualified she is not a specialist employment lawyer.

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4. The claims which later have been characterised as breach of contract claims are opposed. The respondent company said that the claimant had not stated what type of claim was being made and that the claim could not be sensibly responded to. The respondents sought dismissal on the basis of no

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reasonable prospects of success. They set out the history of the claimant's employment with the respondent including events leading up to her resignation.

- 5 5. On receipt of the ET1 it was considered by Employment Judge P O'Donnell, who did not dismiss the claim. He wrote to the claimant on 30 December 2024 inviting her to provide the following information:

- 10 *"1. What term of the contract she says was breached by the respondent;
2. How she says the respondent breached the term identified;
3. What losses she says were caused by the alleged breach of contract."*

6. The claimant responded by e-mail on 16 January 2025. As part of that response she wrote:

- 15 *"My claim is not that I had any entitlement to any of the new jobs (which had not been created by the time I resigned or the time I left, despite consistent assurances that they would be (although the way the process was managed and the respondent's conduct were generally towards me between June and September 2024 is a breach) although the respondent's implied duty of care and duty of trust and confidence, my claim, is that I was instructed to undertake work out with my job description to be appropriately compensated for that additional work."*
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Strike Out

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7. A hearing was arranged for 17 February 2025 and the respondent's agents submitted their written strike-out application. They made reference to a number of authorities which were considered at the hearing. Following that hearing a Note was issued. The reason for this was that during the hearing I had attempted to explore what the legal bases of the claims were. The claimant accepted that they were for breach of contract. She was asked whether she relied on an express term or an implied term. From her response which was to narrate various difficulties she had in the course of her employment it appeared that she was referring to the implied duty of trust and confidence. Her essential complaint that she was asked to do work over and above the work she was employed to do in an area of practice and law that
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she was unfamiliar with and that she had found this stressful. Her health she said had broken down prior to her resignation.

- 5 8. Ms Turnbull helpfully took me through the documents and submissions that had been lodged.
- 10 9. I initially considered giving an oral Judgment. However, as Deposit Orders had been sought I considered that a short adjournment would give the claimant an opportunity of considering her position in the light of the submissions made and time to consider whether to disclose her financial position.
- 15 10. Following the adjournment the claimant indicated that her financial position was stretched and she was a single parent. She summarised her financial position.
- 20 11. I had also noted that the claimant seemed to be suggesting in her ET1 that she had developed psychological difficulties arising from the breach of trust of confidence/breach of express term. I pointed out that there was little in the ET1 which gave the basis for such a claim. I explained to her the powers of the Tribunal to allow amendment of tribunal claims.
- 25 12. In the circumstances, given that striking out is a serious matter I decided to give the claimant an opportunity to consider if she wanted to amend. I explained that she seemed to suggest she had a personal injury claim and that these were normally matters for the civil courts. Nevertheless I advised that the strike out application and any proposed amendment would be considered in chambers on the basis of any further submissions parties wanted to make.
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Further Procedure

13. The claimant wrote to the Tribunal on 25 February setting out an application for leave to amend. She sought to clarify and expand upon what was put in the ET1. She said that her claim for breach of contract has always had two intertwined elements namely a) breach of the express written terms of her contract by being required to do a job role different from the job role she had been employed to do and b) breach of the implied term of trust and confidence in relation to her treatment by HIAL.
14. The claimant stated that she was still suffering from psychiatric illness. She had been off sick with stress. She argued that the balance of hardship favoured the granting of the amendment. She also argued she was simply clarifying her claims and what she was carrying out was a relabelling exercise and not a new claim.
15. Ms Turnbull responded promptly on 25 February opposing the application to amend. The application to amend she said added a new claim to the breach of the implied duty of trust and confidence and was opposed. An analysis of the amendment was that the claimant was seeking damages under two heads namely for personal psychiatric injury and for future loss of earnings post dating termination of the employment. In relation to the claim for personal injury the Employment Tribunal had no jurisdiction to hear such claims or claims for contingent losses arising after the date of termination the claimant's claim revolved around an alleged breach of Clause 3.1 of the Employment Contract. The respondent's position was that a claim based on the alleged breach had no reasonable prospects of success. The amendment was misconceived and should be refused and the claim struck out.

Discussion and Decision

16. The Respondents sought under Regulation 38 of the Employment Tribunals Rules of Procedure 2024 a strike out of the claim on the basis that it had no reasonable prospects of success. The powers of the Tribunal are set out in that Rule which is in the following terms:

“Striking out

38.—(1) *The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply 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;*

(c) *for non-compliance with any of these Rules or with an order of the Tribunal;*

(d) *that it has not been actively pursued;*

(e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).”*

17. A Tribunal is required when addressing such applications to have regard to the overriding objective, which is found in Rule 3.

“Overriding objective

3. (1) *The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*

(2) *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.*

(3) *The Tribunal must shall seek to give effect to the overriding objective when it –*

(a) *exercises any power under these Rules, or*

(b) *interprets any rule or practice direction*

4. *The parties and their representatives must—*

(a) *assist the Tribunal to further the overriding objective, and*

(b) *co-operate generally with each other and with the Tribunal.”*

18. The EAT has held that the striking out process requires a two-stage test (***HM Prison Service v Dolby*** [2003] IRLR 694, and in ***Hassan v Tesco Stores***

Ltd UKEAT/0098/16). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim.

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19. It has been observed that the power of strike out is a draconian one and could only be exercised in rare circumstances. The effect of a successful strike out application would be to prevent a party proceeding to a hearing and leading evidence in relation to the merits of their claim. (***Balls v Downham Market High School & College*** [2011] IRLR 217 EAT).

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20. As a general principle discrimination cases should not be struck out except in very clear circumstances and the cases in which such claims are struck out before the full facts could be established are rare (***Chandhok & others v Tirkey*** [2015] IRLR 195 EAT).

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21. Tribunals should not be deterred from striking out appropriate cases where they are satisfied that there is no reasonable prospect of success. (***Ahir v British Airways*** (2017) EWCA Civ 1392).

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22. In the alternative Ms Turnbull submitted that the claim has little reasonable prospect of success and that a Deposit Order should be made if the case is not struck out. The test is not as rigorous as “no reasonable prospect of success”. The Tribunal’s power to order a Deposit Order of up to £1000 for each specific allegation or argument (***Doran v Department of Work and Pensions*** UKEAT ES/0017/14, ***Van Rensburg v The Royal Borough of Kingston Upon Thames and others*** UKEAT/0096/07 and UKEAT/0095/07, ***Wright v Nipponkoa Insurance (Europe) Ltd*** UKEAT/0133/14).

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23. In approaching this matter I took the claimant’s pleadings at their highest. I also considered if the amendment added anything to the claims when doing

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so. In the circumstances I did not find it necessary to deal with the amendment as even if granted I would have reached the same conclusions.

Background

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24. The claimant, who is a qualified solicitor, was employed by the respondent as a Procurement Advisor between 12 June 2023 and 23 October 2024. This was an area of law that she specialised in. Her role was to be in Corporate services.

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25. The claimant was employed under a contract of employment signed on 13 June 2024 (Page 60 – 67 JB). It provides as follows:

Clause 3.1.

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“The title of the job you will be employed to do is Procurement Advisor. “Your job title conveys the broad nature of the work you are required to perform.”

Clause 22.

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“The information contained in this Agreement, and all associated documents and policies, constitutes a written statement of particulars of employment in compliance with section 1 of the Employment Rights Act 1996.”

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26. The claimant's contract of employment was accompanied by a job description (JB68/77) which set out an overview of the claimant's role and the respondent's expectations.

Page 3 of the claimant's job description stated:

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“You will act as the key contact for internal and external stakeholders on procurement activities associated with Corporate Services primarily but will include other functional areas as required, and will work closely with the procurement team...”

Page 9 of the claimant's job description stated:

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"As a term of your employment, you may at times be required to undertake any other duties, commensurate with your grade, as may reasonably be required of you".

5 The employment contract does not contain any provision entitling her to any additional pay for carrying out additional duties or working additional hours to those set out in her contract of employment.

10 27. Between April 2022 and August 2024 the respondent experienced staff shortages which impacted the services provided to parts of the business. The claimant worked in procurement in the Corporate Services and was asked to assist with procurement for the Infrastructure and Operations parts of the business. This meant that the claimant was asked to do work that she
15 unfamiliar with such as procuring air traffic control services. She found this stressful.

Express Terms/Implied Terms

20 28. The first matter that was addressed was whether the claimant was seeking to rely on any express terms of her contract. At the hearing Ms Turnbull had taken the Tribunal to the claimant's written employment contract and job description which showed that although appointed to carry out procurement for Corporate Services the contract envisaged that she could be deployed to
25 carry out work elsewhere. There was no challenge to the documents or their wording. However, the claimant seemed reluctant to accept that there was no obvious breach of an express term. Her position was simply that she had been employed to carry out procurement for Corporate Services and that was her area of expertise namely in the sort of contracts that airport sites generate
30 such as leases and licenses.

29. When the claimant lodged her amendment it appeared that she still maintains this position. In it she wrote: "HIAL requiring me to do a job which was so

different to that which I was recruited to do is an explicit breach of my written contract and also a breach of the implied term of trust and confidence”.

- 5 30. There was no suggestion that the terms of the contract and Job Description should be construed other than by being given their ordinary meaning. There was no issue of ambiguity raised. It is apparent that the claimant could be asked to carry out other work. The contract specifically states “*other functional areas as required*” and the Job Description states: “*Your job title conveys the broad nature of the work you are required to perform.*” In addition
- 10 the respondents argue in their ET3 that the work the claimant was asked to do was still procurement work. The claimant appears to have been given a lawful instruction by her employer which complied with the law and fell within her contractual duties requiring her to perform tasks or duties related to their employment. I can understand the claimant’s unhappiness about being
- 15 employed to work in one area of the law that she was familiar with and then being asked to carry out new and challenging work which was not in her ‘comfort zone’. I regret, however, that I can see no basis for a claim to be maintained on the grounds of a breach of an express term of the contract. The Rule is clearly engaged. The claim is unarguable and there is no basis
- 20 to allow the proceedings to continue. The claim will be struck out as having no reasonable prospects of success.

Implied Term

- 25 31. Because an employer can within the terms of a contract ask an employee to carry out work of a particular nature there is a connection between express terms and implied. Express terms take precedence but it has been accepted that they can in certain circumstances restrict or qualify express terms (***Johnstone v Bloomsbury Health Authority*** (1991) ICR 269).
- 30 32. We are here now dealing with the implied duty of trust and confidence and it could be argued that the way in which an employer goes about enforcing or putting in to effect express terms could give rise to a breach. It is noteworthy

that the claimant did not refuse to do the work. Nor does she seem to have asked for additional training or support to assist her carry out the work. She writes that the scope of projects and work involved changed. She goes on to say two things:

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33. What she says in her amendment is this:

“I informed my HoD and CFO in June 2024 that I was intending to resign. I decided not to on the basis of reassurances that the situation would be resolved.....

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I was completely messed around from June until September 2024 resulting in me being off sick, with no appropriate HR follow up despite me completing the relevant forms. There was conflicting information about new jobs being created (all deadlines missed and at least one being appointed without being advertised). There was no reliable source of information and no accountability. Back pay to October 2023 was variously mentioned but nothing materialised.”

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34. The fact that the claimant was asked to carry out this work for other parts of the business is only part of her case. She makes reference to reassurances she received (which I understand to relate to pay) and then issues relating to the restructuring of the business. Although lacking in detail there is the possibility of these matters amounting to a breach of the implied duty.

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35. Ms Turnbull drew the Tribunal’s attention to the Rules governing breach of contract claims in Tribunals. The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

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“Extension of jurisdiction

3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

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(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

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(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee’s employment.”

36. She highlighted that although claims for injury arising from the breach could be made the Tribunal's powers were limited by the use of the qualifying words "*other than a claim for damages, or for a sum due, in respect of personal injuries*". This seems to be an accurate statement of the law and excludes such claims in Tribunals although not in civil courts such as the Sheriff Court.
37. In relation to the claim for psychiatric injury the Rule is engaged. I can see no basis on which I could exercise discretion to allow the claim to proceed as it is incurable though amendment. Accordingly it is struck out.
38. Finally, then I had to consider if the claimant could make a claim for loss of wages and if there was any basis for this. In other words what if the claimant were to show a possible breach of the implied duty of trust and confidence or express breach? The Tribunal similarly does not have jurisdiction to hear a claim for contingent losses arising after the date of the termination of employment. Article 3(c) of the Order provides that the employment tribunal has jurisdiction only where "the claim arises or is outstanding on the termination of the employee's employment". In these circumstances it must be accepted that the Tribunal does not have jurisdiction to determine such claims which, at the termination of the employment, are contingent.
39. Looking at the matter in the round it appears that although it is just arguable that there may have been a breach of the implied duty (we have insufficient to consider that matter fully) there is no claim that can be made in relation to psychiatric injury or loss of wages. The anxiety and upset caused by the employer's actions are also not recoverable on the general contractual basis that such claims do not arise from the breach of commercial contracts.

40. In these circumstances the claim(s) for breach of contract arising from the implied duty of trust and confidence or express term must be struck out as having no reasonable prospects of success.

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Employment Judge: J M Hendry

Date of Judgment: 3 April 2025

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Date Sent to Parties: 3 April 2025