



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103132/2019

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Held in Edinburgh on 4 December 2019

Employment Judge: Rory McPherson

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Miss Lungowe Kashina

**Claimant
In Person**

City of Edinburgh Council

**Respondents
Represented by:
A Hood -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that:

1. In terms of the Extension of Jurisdiction (Scotland) Order 1994 the Tribunal does not have jurisdiction to consider the claimant's claim of breach of contract, and that claim is dismissed; and
2. In terms of the Extension of Jurisdiction (Scotland) Order 1994 the Tribunal does not have jurisdiction to consider the claimant's claim in respect of asserted loss arising in consequence of alleged verbal response to a requested reference, and that claim is dismissed; and

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The Tribunal Orders that:

1. The case should proceed to a Case Management Preliminary Hearing to consider further procedure including the respondent's reserved position on time bar in respect of the remaining aspects of the claimant's claim; and
2. the parties should respond to date listing schedules within the time frame set out in the notification to the parties.

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E.T. Z4 (WR)

REASONS

Introduction

Preliminary Procedure

1. The case called for Open Preliminary Hearing at Edinburgh on 4 December 2019 for determination of the Preliminary Issue of Jurisdiction on two of Miss Kashina's complaints. The first complaint by Miss Kashina was in relation to an alleged Breach of Contract by the City of Edinburgh Council (the Council). The second complaint was the Loss which she says arises from, what is now clarified to be, an alleged verbal response on behalf of the respondent in response to a request by a third party and prospective employer for a reference. Reference is made to Tribunals letter of 14 October 2019 and paragraph 1.7 of the Tribunal's Note dated 27 November 2019.
2. The claimant, Miss Kashina, appeared on her own behalf. The Council were represented by Ms. Hood.
3. The case is one in which Miss Kashina complains of various matters arising from her employment with the Council including the matters identified above, and what are understood to be complaints broadly stated to be breaches of the Working Time Regulations 1988.

The Issues

4. The issues for determination by the Tribunal at this Open Preliminary Hearing was whether the Tribunal has Jurisdiction to hear the claimant's claim of breach of contract, and further whether the Tribunal has jurisdiction to hear the claimant's claim in respect of asserted loss arising in consequence of alleged verbal response on behalf of the Council to a requested reference.

Findings in Fact

5. On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those necessary for the determination of the issues before the Tribunal.

- 5 6. Miss Kashina started with the Council on 1 December 2014 and while there have been some changes in her role as an employee, including moving from full time to part time, she has remained an employee of the Council since that time.

Submissions

- 10 7. For the Council, Ms. Hood argued that as Ms. Kashina has continued to be an employee of the Council, in accordance with The Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 the Tribunal does not have jurisdiction to consider the asserted breach of contract claim. Further the Tribunal does not have jurisdiction to jurisdiction to hear the claimant's claim in respect of asserted loss arising in consequence of alleged verbal response to a requested reference. In addition, Ms. Hood referred to **Ahir v British Airways plc** [2017] EWCA Civ 1392 (**Ahir**) at para 16, per Underhill LJ
15 *“Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.”*

- 25 8. Ms Hood in addition referred to paragraphs 4 and 5 of the Tribunal Judge's Note of the telephone Case Management Hearing which was sent to the parties 13 June 2019. That Note records that Kashina was advised by the Tribunal Judge that he

30 *“4 ... noted that she had been in contact with a solicitor and was likely to get advice in the near future.”*

and further that he:

“5. ... explained that that she could not make a claim for breach of contract as her employment was still continuing.”

9. Ms. Hood, however, on consideration of the issues, and history of this case confirmed that the Council did not seek to insist upon an award of expenses against Ms Kashina in terms of Rules 74 to 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 2013 Rules) in relation to Ms. Kashina’s pursuance of these two heads of claim and this hearing.
10. In response to Ms Hoods’ submissions, and while Miss Kashina maintained that she was in dispute with the Council in respect of both matters (being the alleged breach of contract and what she considers to be a loss arising in consequence of an alleged verbal response to a requested reference), she did not seek to argue that the Tribunal did have the ability to decide upon either of those matters.

The Law

11. **The Employment Tribunals Act 1996** provides at ss (2) and (3) that:

(2) Subject to subsection (3), this section applies to—

- (a) a claim for damages for breach of a contract of employment or other contract connected with employment*
- (b) a claim for a sum due under such a contract, and*
- (c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,*

if the claim is such that a court in ... Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

(3) This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.

12. **The Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994** provides that

“3 Extension of jurisdiction

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—

- (a) the claim is one to which (s 3(2) Employment Tribunals Act 1996) applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;
- (b) ...
- (c) **the claim arises or is outstanding on the termination of the employee's employment.**

13. Rule 37 of the **2013 Rules** provides that

“37 Striking out

(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;
- (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 or response (or the part to be struck out).

5 *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”*

Applicable Law Discussion and Disposal

14. The provisions which prescribe the Tribunal’s Jurisdiction (ability to consider) in respect of both claims considered at this hearing, are as set out in the
10 paragraphs above.

15. Ms. Kashima remains an employee of the Council. Miss Kashima has been provided with an opportunity to make representations. The Employment Tribunal does not have jurisdiction to consider Miss Kashima’s breach of contract claim. The Employment Tribunal does not have jurisdiction to
15 consider Miss Kashima’s claim for alleged loss which she says arises from, what is now clarified to be, an alleged verbal response on behalf of the respondent in response to a request by a third party and prospective employer for a reference. That claim for loss is set out as a free standing complaint not as part of any statutory complaint which the Tribunal may have jurisdiction.
20 Accordingly, both those claims are struck out and dismissed.

16. While Ms. Hood made reference to **Ahir**, I do not consider that is open to this Tribunal to consider whether it is “*satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established*” as this Tribunal does not have jurisdiction to consider either complaint.

25 17. It is understood, that the Council will continue to argue, as identified from the Note of the telephone Preliminary Hearing attended by Ms Kashina on 7 June 2019, that remaining aspects of Miss Kashina’s claims were not brought within the relevant time limit. Further, it is understood that the Council will argue, that there is no basis for the Tribunal extending that time limit. Those matters will
30 require to be considered at a future hearing; however, I am satisfied in the

meantime, that further procedure of Miss Kashima's remaining claims should be considered at a further Case Management Preliminary Hearing.

18. It will be a matter for Ms Kashina whether she seeks legal advice in relation to the issues which arise in relation to the remaining aspects of her claim.

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Date of Judgement: 4th December 2019
Employment Judge: R McPherson
Date Entered in Register: 10th December 2019
And Copied to Parties

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