EMPLOYMENT TRIBUNALS

Claimant: Miss A Nezianya

Respondent: Foreign Commonwealth and Development Office

Heard at: London Central (by video) **On:** 7 August 2024

Before: Employment Judge E Burns (sitting alone)

Appearances
For the claimant: Represented herself
For the respondent: Jack Feeny, Counsel

JUDGMENT

The Claimant's complaint of constructive unfair dismissal was not struck out under tribunal rule 37(1)(a) for having no reasonable prospects of success, nor was a deposit order made under tribunal rule 39.

REASONS

INTRODUCTION

1. The Claimant's claim is that she was unfairly constructively dismissed by the Respondent. She says she resigned from her employment with the Respondent in August 2023 in response to it having committed a fundamental breach of contract.

2. The hearing was listed as a preliminary hearing to be heard in public to determine the application made by the Respondent on 16 May 2024. That application was that either the Claimant's complaint of constructive unfair dismissal should be struck under rule 37(1)(a) for having a lack of reasonable prospects of success or, in the alternative a deposit order should be made under rule 39.

3. The basis for the application was a narrow legal point, namely that the Claimant was not dismissed, constructively or otherwise, because subsequent to her resignation, she accepted a position within the

Department for Business and Trade (another Government department) and was accordingly granted continuity of service.

4. The Respondent argued that because the Claimant was a Crown employee, she should be treated differently to other types of employee meaning that I should apply the definition of dismissal found in section 191(4)(c) Employment Rights Act 1996 to her.

5. It argued that that sub-section:

"clarifies/modifies the term "dismissal" so that it is to be read as a reference to termination of Crown employment. A civil servant will only be dismissed from Crown employment if she no longer works for ***any*** *Government department (or other body exercising Crown functions). If she is not dismissed from Crown employment she is unable to bring a claim of unfair dismissal."* (Mr Feeny's written submission, paragraph 15, emphasis added).

6. Mr Feeny explained that there were strong policy reasons why parliament saw fit to limit the ability of Crown employees to claim unfair dismissal when moving between Government departments. He did not, however, refer me to any explanatory notes or Hansard discussions confirming this was Parliament's intention however. He also said that he had been unable to find any case law authority on the point.

THE HEARING

7. Prior to determining the Respondent's application, I discussed the issues in the case and, in particular, the breaches the Claimant was seeking to rely on as these were not clear from the pleadings. The Claimant had prepared a more detailed timeline to assist with this. The breaches she relies upon are now recorded in a list of issues that is attached to a separate case management order I also issued following the hearing.

8. At the hearing I had access to a bundle prepared by the Respondent and to additional documents provided by the Claimant on the morning of the hearing. The only document provided by the Claimant which I reviewed was the written agreement between her and the Respondent dated 29 August 2024. I ensured that this was shared with Mr Feeny and he had time to look at it before the hearing proceeding.

9. I am grateful to Mr Freeny for the clarity and concision of his written and oral submissions which I found very helpful.

10. I gave an oral decision. I have prepared this judgment in writing because Mr Feeny asked for written reasons.

FACTUAL BACKGROUND

11. I did not hear any evidence. I therefore make no findings of fact. I set out below my understanding of the relevant events that led to the claim, but

this should not bind any tribunal that hears evidence with regard to its findings of facts.

12. It was not in dispute that the Claimant started working for the Respondent, a Government department, on 6 September 2018. It was also not in dispute that she entered into an agreement with the Respondent dated 29 August 2019 which says the following at clause 2.4:

"This agreement ….. is intended to be an Apprenticeship Agreement within the meaning of [the] Apprenticeship, Skills, Children and Learning Act 2009. Therefore this contract will be a contract of employment and not a contract of apprenticeship and you will be treated at all times and for all purpose as an employee of the Crown."

13. In August 2023, the Claimant resigned from her position in the Respondent. She says this was because of the Respondent's mismanagement of her apprenticeship and lack of progress within her professional development.

14. The Claimant left on 9 September 2021 and started a different role in the Department for Business and Trade on 11 September 2021.

15. The change was treated as a transfer. The Claimant was issued with a letter dated 4 September 2024, which I saw, confirming this and that the Claimant's continuity of service would be preserved. The letter says nothing about the status of the Apprenticeship Agreement.

16. The Claimant's new position in the Department of Business and Trade is not an apprenticeship. She is working in an entirely different role.

17. The Claimant told me that she was offered the new role after she applied for it through an external civil service recruitment process. She said she did not request a transfer. However, once she informed her line manger of the new role, it was treated as a transfer, but, according to her, this was because this was the way the Respondent chose to deal with it and she had no input into this. Mr Feeny was not able to agree if this version of events was disputed or not as he had no instructions on this point.

THE LAW

Strike Out under Rule 37 for Lack of Prospects of Success

18. Rule 37(1)(a) of the Tribunal Rules allows a tribunal to strike out all or part of a claim on the ground that it has no reasonable prospect of success.

19. In such cases, the tribunal should consider the claimant's case at its highest. This means examining the pleaded facts and for the purposes of the strike-out consideration assuming (unless there is a compelling reason not to) that the claimant's version of any key disputed facts is correct.

Deposit Orders

20. Rule 39 of the Tribunal Rules says:

> "(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

21. The purpose of a deposit order is to identify at an early stage claims with little prospect of success so as to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed. Their purpose is not to make it difficult to access justice or to effect a strike-out by another route (*Hemdan v Ishmail and anor* 2017 ICR 486, EAT).

22. Similar considerations apply to those required as in a strike out application under rule 37(1)(a) where a claim is said to have no prospects of success.

23. When determining whether to make a deposit order, I am not restricted to a consideration of purely legal issues. I am entitled to have regard to the likelihood of the party being able to establish the facts essential to her case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07).

Relevant Statutory Provisions

24. The right to pursue a claim for unfair dismissal is found in section 94 of the Employment Rights Act 1996. Section 94 says that only "employees" can pursue the right to claim unfair dismissal.

25. The definition of an employee is found in section 230(1) of the same Act. It says that an employee is an Section 230(1) of the Employment Rights Act 1996 tells us that an employee is an individual who works (or worked) under a contract of employment. Section 230(2) confirms that a contract of employment means a contract of service or apprenticeship.

26. The definition of what constitutes a dismissal is found in section 95 of he Employment Rights Act 1996.

27. Although it is unusual for an employee who changes from one job to another with the same or an associated employer (and therefore has continuity of service) to pursue a claim of unfair dismissal there is no general legal principle that prevents this. Whether or not a dismissal has taken place, as defined in section 95 of the Employment Rights Act 1996, depends upon the contractual position and whether the employee's original contract of employment was terminated. Here the Claimant is

arguing termination via the mechanism of by repudiatory breach and acceptance in the form of resignation relying on section 95(c) of the Employment Rights Act 1996.

28. Section A5 of the Apprenticeship, Skills, Children and Learning Act 2009 says the following:

"A5 English apprenticeship agreements: status

(1) To the extent that it would otherwise be treated as being a contract of apprenticeship, an approved English apprenticeship agreement is to be treated as not being a contract of apprenticeship.

(2) To the extent that it would not otherwise be treated as being a contract of service, an approved English apprenticeship agreement is to be treated as being a contract of service.

(3) This section applies for the purposes of any enactment or rule of law."

29. Section 191 of the Employment Rights Act 1996, in full, says the following:

"191 Crown employment

(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2) This section applies to—

(a) Parts I to III,
[(aa) Part IVA,]
(b) Part V, apart from section 45,
[(ba) Part 5B,]
[(c) Parts VI to [VIIIB],]
(d) in Part IX, sections 92 and 93,
(e) Part X, apart from section 101, and
(f) this Part and Parts XIV and XV.

(3) In this Act "Crown employment" means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(4) For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1)—

(a) references to an employee or a worker shall be construed as references to a person in Crown employment,

(b) references to a contract of employment, or a worker's contract, shall be construed as references to the terms of employment of a person in Crown employment,

(c) references to dismissal, or to the termination of a worker's contract, shall be construed as references to the termination of Crown employment,

(d) references to redundancy shall be construed as references to the existence of such circumstances as are treated, in accordance with any arrangements falling within section 177(3) for the time being in force, as equivalent to redundancy in relation to Crown employment, . . .

[(da) the reference in section 98B(2)(a) to the employer's undertaking shall be construed as a reference to the national interest, and]

(e) [any other reference] to an undertaking shall be construed—

(i) in relation to a Minister of the Crown, as references to his functions
or (as the context may require) to the department of which he is in charge, and

(ii) in relation to a government department, officer or body, as references
to the functions of the department, officer or body or (as the context may
require) to the department, officer or body.

(5) Where the terms of employment of a person in Crown employment restrict his right to take part in—

(a) certain political activities, or
(b) activities which may conflict with his official functions,
nothing in section 50 requires him to be allowed time off work for public
duties connected with any such activities.

(6) Sections 159 and 160 are without prejudice to any exemption or immunity of the Crown."

ANALYSIS AND DECISION

30. Before considering the application of section 191 of the Employment Rights Act 1996, I first considered the prospects of the Claimant establishing she was dismissed if the standard provisions contained in the Employment Rights Act 1996 relating to employees were to be applied to her.

31. Taking the Claimant's case as its highest, her contract with the Respondent was terminated and when she commenced employment with

the Department of Business and Trade it was under a different contract. I also found that this is the likely factual finding that will be made at the final hearing. I say this because there was no ongoing apprenticeship element in the contract between the Claimant and the Department of Business and Trade. I took the view that the difference in the contracts seemed to me to be sufficient to demonstrate the first contract was ended and replaced with a new contract.

32. The Respondent's argument was essentially that the standard provisions applying to employees should not be applied to the Claimant because of her status as a Crown employee. I decided against this for the following reasons.

33. The first reason was because I considered section 191(4)(c) the Employment Rights Act 1996 did not apply to the Claimant's case.

34. I say this because, in my judgment, section 191 Employment Rights Act 1996 was not enacted so as to limit Crown employees from pursing claims of unfair dismissal, but to enable them to do so.

35. Mr Feeny referred to me a very helpful extract from Harvey on Industrial Relations and Employment Law (H/3D) that provided me with information about the historical context for what were once called Crown servants. That extract explains that historically such categories of worker were regarded as having no contract and therefore not to meet the definition of employee within the Employment Rights Act 1996. The consequence was that they could not benefit from the protection offered by the Act.

36. Having section 191 of the Employment Rights Act 1996, however, ensures Crown employees can pursue claims under the Employment Rights Act 1996 where they cannot show they met the definition of being an employee under the Act.

37. My decision about this was reinforced by the fact that section 191(4) is a construction clause in the sense that it is an aid to interpretation. The sub-section makes alterations to the language used in other sections of the Employment Rights Act 1996 so as to ensure those sections make sense when applying them to someone where the standard statutory provisions that use the terms employee, contract of employment and dismissal, do not fit. The purpose of the sub-section is to tell us what words to use instead for a person to whom these standard terms do not make sense.

38. It was not disputed that in this case, the Claimant does meet the definition of an employee. Her status as an employee employed under a contract of employment was clearly and expressly stated in the written agreement her and so in my judgment, this means the ordinary rules can be applied to her without needing any aid to interpretation.

39. A further reason for taking the view that section 191(4)(c) Employment Rights Act 1996 did not apply to the Claimant was because her agreement with the Respondent expressly stated that it was an Apprenticeship

Agreement within the meaning of the Apprenticeship, Skills, Children and Learning Act 2009. As a result, sub-section A5(2) of that Act would therefore apply to it. I interpreted that section, when read with sub-section A5(3) as overriding any enactment that says that a person who is employed under an Apprenticeship agreement should not be treated as if they were employed under an ordinary employment contract.

40. In my judgment, this was relevant because a provision in a piece of primary legislation enacted more recently the Employment Rights Act 1996 that says the Claimant must be treated as employed under a contract of service and therefore it follows that she must be treated as an employee for the purpose of any enactment without needing to rely on section 191 Employment Rights Act 1996.

41. The final reason for rejecting the Respondent's application was that I disagreed with the Respondent's interpretation of section 191(4)(c) Employment Rights Act 1996 in any event. This reason operates if my reasoning so far was not correct and section 191(4)(c) Employment Rights Act 1996 should be applied to the Claimant.

42. As identified above, section 191(4) is a construction clause which is intended to aid interpretation. This, it tells us that when we see the words "employee" or "worker", we should replace them with "a person in Crown employment" instead.

43. Section 191(4)(c) says that when we see the word dismissal, we should replace it with "termination of Crown employment". In my judgment this is simply to exchange language associated with employment of an employee that meets the definition of employee in the Act, with language that makes more sense for a Crown employee.

44. The provision does not expressly say that as an exception to the normal rule, for Crown employees that move between Government departments, the termination of one period of Crown employment cannot constitute a dismissal. The provision does not even include the words "any" or "all".

45. I am confident that had the intention of Parliament been to create the situation that a civil servant could only claim unfair dismissal after they had finished working for all Government departments, this would have been done in a much less ambiguous way. I am also confident that there would be a well known, easy to find, case law authority on the point given that section 191(4)(c) has been in force since 1 July 1999.

My decision was therefore not to strike out the claim or make a deposit order.

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Employment Judge E Burns
1 October 2024

Sent to the parties on:

4 October 2024

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For the Tribunals Office