Case Number: 1403012/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mrs. Kaitlyn Howarth**

Respondent: **Ministry of Defence**

Heard at: **Bristol ET via VHS** **On:** **26 January 2023**

Before: **Employment Judge G. King**

Representation
Claimant: In person
Respondent: Mr. T. Kirk - counsel

RESERVED JUDGMENT

1. The claim in respect of Unfair Dismissal pursuant to s.94 Employment Rights Act 1996 has no reasonable prospect of success and is struck out. If the Tribunal had not struck that claim out, the Tribunal would have ordered that a deposit be paid in the sum of £500 as a condition of the allegations or arguments for those claims proceeding.

2. The claim in respect of Wrongful Dismissal pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 has no reasonable prospect of success and is struck out. If the Tribunal had not struck that claim out, the Tribunal would have ordered that a deposit be paid in the sum of £500 as a condition of the allegations or arguments for those claims proceeding.

3. The claim in respect of Direct Discrimination on the basis of race pursuant to s.13 Equality Act has no reasonable prospect of success and is struck out. If the Tribunal had not struck that claim out, the Tribunal would have ordered that a deposit be paid in the sum of £500 as a condition of the allegations or arguments for those claims proceeding.

4. The claim in respect of Victimisation pursuant to s.27 Equality Act has no reasonable prospect of success and is struck out. If the Tribunal had not struck that claim out, the Tribunal would have ordered that a deposit be paid in the sum of £500 as a condition of the allegations or arguments for those claims proceeding.

5. The claim in respect of Direct Discrimination on the basis of pregnancy / maternity pursuant to s.13 Equality Act is dismissed by way of withdrawal.

6. The claim in respect of accrued but unpaid holiday pay pursuant to the Working Time Regulations 1998 is dismissed by way of withdrawal.

REASONS

The Claims

1. By a claim form dated 27 August 2021, the Claimant brings claims of:

    a. Unfair Dismissal pursuant to s.94 Employment Rights Act 1996 ("ERA");
    b. Direct discrimination on the basis of race pursuant to s.13 Equality Act ("EqA");
    c. Victimisation pursuant to s.27 EqA;
    d. Discrimination arising from pregnancy / maternity pursuant to s.18 EqA;
    e. Wrongful Dismissal pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 ("the 1994 Order"), and;
    f. Accrued but unpaid holiday pay pursuant to the Working Time Regulations 1998.

2. It was confirmed by the Claimant during the course of this hearing that her claims in respect of discrimination arising from pregnancy or maternity (d), and her claim in respect of accrued but unpaid holiday (f) were being withdrawn.

The Issues

3. This was a preliminary hearing to consider the Respondent's arguments that:

    a. The provisions of the Act of Settlement 1700, the Aliens Employment Act 1955 (as amended), the Aliens Restriction (Amendment) Act 1919 and the Aliens Employment Act 1955, preclude the employment of the Claimant as a non-British national in the Home Civil Service and the Diplomatic Service. The Respondent argues that the consequence of the relevant provisions of those Acts and regulations are consolidated in the Civil Service Nationality Rules ("CSNR"), and that the Claimant's employment by the Respondent was in breach of the rules and the primary legislation, and was therefore void from the answers, with the effect that the Claimant's contract of employment (and critically her rights through that contract) are unenforceable. The Respondent argues

that that is a complete answer to the Claimant's claims of unfair dismissal and wrongful dismissal in breach of notice, and;

b. Paragraph 5, schedule 2 Equality Act 2010 acts as a bar to claims against the application of: "rules restricting to persons of particular birth, nationality, descent or resident – (a) employment in the service of the Crown." The Respondent argues that CSNR serves to restrict the employment of those in the Home Civil Service (and Diplomatic Service) because of nationality, such restriction being permitted by paragraph 5, schedule 22 EA 10. The Respondent argues that the Tribunal therefore has no jurisdiction to consider to the Claimant's claims under the Equality Act 2010.

4. The Tribunal was assisted by a bundle of 167 pages. Where referred to, pages from the bundle are denoted by [square brackets]. The Tribunal was also assisted by skeleton arguments from both the Claimant and the Respondent. The Respondent elected to provide a reply to the Claimant's skeleton argument. The Claimant had permission to do so but chose not to. The Tribunal heard from one witness, Ruth Smith, Head of HR Service Deliver, on behalf of the Respondent. The Claimant had been permitted to provide witness evidence, but chose not to do so and to rely on her skeleton argument.

5. The relevant authorities were provided in a separate bundle of 158 pages, or separately in the case of the authorities relied on by the Claimant. Pages from the Authorities Bundle are designated by [square brackets] prefixed AB. Other authorities are referred to separately.

Background

6. The Claimant, who was born on 22 January 1987, was employed by the Respondent between 4 January 2016 and 6 July 202 as a Project Controls Manager.

7. The Claimant self-identifies as an American National. She is married to a British National and has held the right to work in the United Kingdom since January 2014 is a provision of her Spouse Visa.

8. The Claimant commenced employment for the Respondent in 2015 following the necessary security checks associated with adjoining the Ministry of Defence and was engaged as a civil servant. The rules governing the appointment civil servants are the CSNRs. The Claimant asserts that one such check included the Disclosure and Barring Service consulting with the Home Office to confirm that American Nationals were permitted to work for the Respondent. The Claimant obtained the necessary Security Check Clearance and completed all security vetting checks. She stated that in 2017 she was promoted internally, and again similar checks were conducted in respect of her promoted role.

9. In 2019 the Respondent advertised a role, which amounted to a promotion to the Claimant. One criterion was that the role was for "sole UK National applicants only." The Claimant initiated an internal grievance complaining of discrimination, the outcome of which was provided in March 2020. The complaint was upheld on the basis that: "Whilst the advice that it is possible to advertise roles as UK Nationals only is correct it should not have been applied as an umbrella approach to advertising both reserved and non-reserved posts. Either the campaign should have stated "open to all but some UK Nationals only" or they should have been advertised separately." [B42]

10. In November 2020, the Claimant applied for the promotion, the caveat detailed above having been removed. The Claimant was successful at interview in December 2020 and January 2021 security checks were undertaken in relation to the promoted role. On 6 July 2021, the Respondent informed the Claimant that she would be dismissed from the Civil Service altogether because "as a United States National, [she was] ineligible for employment in the Civil Service"; the Claimant was advised that her contract of employment was void from the outset. The Respondent advised the Claimant of the ability to apply for an Alien Certificate, but the Respondent itself could not make such an application, and in the absence of that certificate stated that it had no option but to dismiss the Claimant.

11. On 3 June 2021, the Respondent further confirmed that the position was that an alien certificate could not be used to correct a previous error in the recruitment process regarding eligibility under the CSNRs. Therefore, in the Claimant's situation, an alien certificate would not be approved [B140].

12. Upon termination, the Respondent initially did not pay the Claimant pension, notice pay, or compensation for accrued but untaken annual leave, or any performance award, on the basis that the contract was void ab initio. It appears that no consideration was given to the payment of such awards on a quantum meruit basis. The Respondent refused the Claimant a right of appeal.

13. The Respondent asserts that the Claimant's initial appointment was in error, caused by its own employees' failure to consider the CSNR at the point of the Claimant's application prior to her appointment. The Respondent asserts that that error was repeated in 2017 prior to the ratification of the Claimant's promotion. It argues that it only became aware when the relevant check was made upon the Claimant further successful application for promotion in 2021. The Respondent asserts that it made a retrospective application to the Cabinet Office for an alien certificate, but such an application was not possible in the circumstances of the case.

14. Despite the fact the contract was void ab initio, the Respondent paid the Claimant £19,000 as an ex-gratia payment in respect of six months net

pay and her 2021 annual performance award. In addition, it paid refunded the Claimant £8,299.26 in respect of her contribution to her pension scheme, and it paid £2,502.70 in relation to any accrued but untaken annual leave on 31 January 2022. The Claimant accepts that these payments were made.

The Law

Strike Out – General Principles

15. Rule 37 of the ET Rules (at [A17]) gives the Tribunal power to strike out a claim. Specifically, the relevant part of the rule states:

> "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….".

16. In *Mechkarov v Citibank N.A* [2016] ICR 1121 (at [A118]), Mitting J, sitting alone in the EAT, provided the following guidance (at [14]) in respect of the proper approach to be taken in a strike out application in a discrimination case (with emphasis added):
    a. Only in the clearest case should a discrimination claim be struck out.
    b. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.
    c. The Claimant's case must ordinarily be taken at its highest.
    d. If the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.
    e. The Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

Deposit Order

17. Rule 39 of the ET Rules [A18] allows the Tribunal to impose a deposit order against a party. Specifically, the rule states:

> "39.— Deposit orders
> (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."

18. The Tribunal is not limited to ordering a party to pay £1,000 in total but can impose multiple deposit orders in relation to a 'specific allegation or argument' within the same claim.

Requirement for a Contract of Employment

19. It is prerequisite to both a claim for unfair dismissal under the ERA 1996 and a claim for wrongful dismissal / breach of contract under the 1994 Order that the individual suing is an employee and that there existed an enforceable contract of employment:
    a. "Under s.94 of the ERA 1996 [A12], only "an employee" has the right not to be unfairly dismissed. Under s.230(1) "employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment" [A13],
    b. Under s.3 of the 1994 Order, proceedings must similarly be brought by "an employee" [A9]."

Paragraph 5 of Schedule 22 of Equality Act 2010

20. Paragraph 5 of Schedule 22 of EqA [A16] states:

"(1) A person does not contravene this Act—
(a) by making or continuing in force rules mentioned in sub-paragraph (2);
(b) by publishing, displaying or implementing such rules;
(c) by publishing the gist of such rules.

(2) The rules are rules restricting to persons of particular birth, nationality, descent or residence—
(a) employment in the service of the Crown;
(b) employment by a prescribed public body;
(c) holding a public office (within the meaning of section 50)…"

Deliberation

21. The first point raised by the Respondent related to the Claimant's claims in respect of unlawful dismissal and breach of contract with regard to notice pay.

22. The Claimant was asked if she agreed that her contract was illegal, and therefore void, from the start. Her answer was "yes, probably". In clarifying her answer, she agreed that the contract had been illegal from the start but stated that the consequences of that illegality had not been resolved.

23. I am minded that the Claimant is litigant in person, and the Tribunal must take her case, or what the Tribunal perceives to be her case, at its highest.

24. I have taken into consideration the authority of *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, in which Peter Gibson LJ said the following [AB12]: "In two types of case it is well established that illegality renders a contract unenforceable from the outset. One is where the contract is entered into with the intention of committing an illegal act; the other is where the contract is expressly or implicitly prohibited by statute: *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, 283 per Devlin J.

25. It was further noted in that case that "[T]he court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class, it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not".

26. The Claimant has argued that her case is different from the decision in *St John Shipping Corporation v Joseph Rank Ltd*, and the decision in *Secretary of State for Justice v Betts* [2017] ICR 1130, as she says the consequences of the contract being illegal from the start are different. I have understandable sympathy for the position the Claimant finds herself in, but unfortunately for her, the level of harm or impact does not alter the legal positions set out in these cases.

27. The Claimant also relies on a number of authorities to support her argument that, despite not having a contract of employment, she should nonetheless be allowed to bring a claim that would otherwise require one in the employment Tribunal.

28. I'm grateful to the Claimant for bringing these cases to my attention, but with the greatest respect to her I disagree with her interpretation of these cases.

29. In *Okedina v Chikale* [2019] ICR 1636, cited by the Claimant in her skeleton argument, Underhill LJ recognised a distinction between "statutory" and "common law" illegality:

> (1) "Statutory illegality applies where a legislative provision either
>
> (a) prohibits the making of a contract so that it is unenforceable by either party or
>
> (b) provides that it, or some particular term, is unenforceable by one or either party…
>
> (2) Common law illegality arises where the formation, purpose or performance of the contract involves conduct that is illegal or contract or public policy and where to deny enforcement to one or other party is an appropriate response to that conduct".

30. The *Okedina* case*,* as with this current case, concerns statutory illegality, however in the view of the Tribunal the immigration law provisions discussed in *Okedina* are not sufficiently similar to the CSNRs, which place limits on the lawful authority to appoint persons as civil servants.

The Tribunal agrees with the Respondent that the case of *Betts* is more analogous to the Claimant's situation, in that the *Betts* case deals with legislation expressly prohibiting the making of a contract of employment and set out that any purported contract not complying with those mandatory provisions was unenforceable.

31. The Tribunal notes that the relevant provisions of the CSNRs, the Act of Settlement, the 1919 Act and the 1955 Act did apply at the material time of the Claimant's purported employment and these provisions did both prohibit her appointment and make it an offence.

32. The Claimant further relies on *Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam* [2010] ICR 66. This is a problematic case, and was expressly disapproved of in *Betts*, with Simler P holding that "I find the EAT's reasoning difficult to follow in this case".

33. Even if the reasoning in that case is correct, the Tribunal finds it would not assist the Claimant, as Simler P went on to say: "there was a general power to employ staff, so that, although the appointment as a hospital consultant was ultra vires, the NHS trust's general power could be relied on". In *Betts* it was held that, by contrast "there was no general power to employ individuals under contracts of employment in HMPS other than in accordance with the recruitment principles" [AB159]

34. The case of *Annandale Engineering v Sampson* [1994] IRLR 59, by contrast, concerns common law illegality. Nor did it concern a contract of employment which was alleged to have been void from the outset, as is the case here, because of some provision of statute. The Tribunal does not consider that the *Sampson* case is relevant to this current matter.

35. Having considered the above, the Tribunal agrees with the Respondent's submission that the Claimant's purported employment contract was voided on the grounds of illegality, in that the Claimant's employment was contrary to the statutory nationality requirements. The Claimant at least partially accepted this. The Tribunal does not find any merit in the Claimant's arguments that her case should be distinguished from *St John Shipping Corporation* or *Betts* on the basis of the consequences of the illegality. The other cases cited by the Claimant do not assist her any further.

36. The Tribunal therefore finds that the Claimant's contract of employment was void from the start, as it was not permitted by statute. Since without a contract of employment the Claimant is not an employee (see s.230(1) ERA), and under s.94 of the ERA 1996, only "an employee" has the right not to be unfairly dismissed, it is the Tribunal's finding that the Claimant's cannot bring a claim of unfair dismissal. The claim in respect of unfair dismissal therefore has no reasonable prospect of success and should be struck out for this reason.

37. The Tribunal similarly finds that, since under s.3 of the 1994 Order, proceedings in respect of breach of contact claim must be brought by "an employee", and the Claimant was not an employee, the Claimant's claim in respect of wrongful dismissal (notice pay) has no reasonable prospect of success and should also be struck out for this reason.

38. The Claimant has brought further claims of direct discrimination claim in relation to the termination of her employment and failure to pay enhanced maternity pay on the ground of race, specifically her nationality. She has also said the same acts by the Respondent were done on grounds of victimisation. Her claim in respect of pregnancy / maternity leave discrimination has been withdrawn, as noted above. The Tribunal must therefore consider the Respondent's argument that these claims should be struck out on the basis that they have no reasonable prospect of success as the Respondent says it has a total statutory defence to these claims.

39. Paragraph 5 of Schedule 22 of Equality Act provides a statutory defence for any purported breach of the act. The Respondent contends that it benefits from this statutory defence. The Tribunal is satisfied that the CSNR are "rules restricting to persons of particular birth, nationality, descent or residence … employment in the service of the Crown" and/or "… employment by a prescribed public body". The Claimant did not dispute this. The Respondent's case is therefore that by "implementing such rules" the Respondent did not contravene the Act, as per (1).

40. It is the Respondent's case that, as the Claimant's contract was void from the start, it follows that the Claimant was not dismissed from employment, because she should never have been employed by the Respondent. In assessing the Equality Act claims in these deliberations, however, the Tribunal uses the words "dismissed" and "dismissal" as a general terms for the point when the Claimant's employment with the Respondent ended.

41. The Claimant relies on two allegations of unfavourable treatment / detriment in respect of her claims for race discrimination and victimisation respectively, and these are the same for both claims. These are that she was dismissed on 6 July 2021; and that the Respondent failed to pay her enhanced maternity pay. It is not disputed that both of these circumstances arose because the Respondent implemented the CSNR.

42. In looking at the claim of race discrimination, the Tribunal must consider if the dismissal and the failure to pay enhanced maternity pay amounted to less favourable treatment, and if so, was that less favourable treatment due to the Claimant's race? It is accepted by the Respondent that they did dismiss the Claimant because she was an American National, but this is what the CSNR and statutes require.

43. The Tribunal is satisfied that the Claimant's nationality meant that, under the rules, she was prevented from being employed as a civil servant. The Tribunal is further satisfied that Paragraph 5 of Schedule 22 of the Equality

Act, as set out above, does provide the Respondent with a statutory defence in respect of their actions regarding implementing the CSNR. This is not a fact sensitive issue but is a matter of law. The Tribunal finds that a future Tribunal at a full hearing of this case could not come to any other decision than that found by this Tribunal. The Respondent has a statutory defence to the claim, and the Claimant therefore has no reasonable prospect of success and should be struck out.

44. Regarding the claim of victimisation, the Tribunal has to consider whether or not the dismissal and the failure to pay enhanced maternity pay are a detriment, and if so, did the Respondent subject the Claimant to that detriment because she had done a protected act, namely raised a grievance in relation to some jobs being advertised as "sole UK National applicants only"; the outcome of which was provided in March 2020?

45. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence, except in very rare and narrow cases in which the contemporaneous documentary evidence can show that a party's case is inconsistent with that evidence.

46. The Tribunal finds that this is such a case. It is clear that the Respondent made an error in their previous checks regarding the Claimant's eligibility to work for the Respondent, but once this mistake had been realised (upon the Claimant being successful interview preparation and requiring further checks to be carried out) the Respondent realised had no option but to comply with its statutory duties.

47. There is also evidence that the Respondent tried to make a business case for the Claimant to stay employed them [115 – 119]; enquired whether the Claimant's husband had triggered his freedom of movement rights by working in an EEA country [124]; or to retrospectively apply for an Alien's Certificate [131]; although none of these enquiries were successful in avoiding the need to terminate the Claimant's employment. The Tribunal finds that such actions are entirely inconsistent with the Respondent implementing the CSNR because the Claimant did a protected act. Again, the Tribunal finds that a future Tribunal at a full hearing of this case could not come to any other decision than that found by this Tribunal.

48. The Tribunal makes a further finding in respect of the less favourable treatment / detriment of the Respondent failing to pay enhanced maternity pay. The Claimant's only right to receive enhanced maternity pay was a contractual one. It was something offered to employees with a certain length of service, as part of the contract of employment. As the Claimant's contract was void from the start, then she had no contract under which it should have been paid. The Tribunal therefore finds that this cannot amount to less favourable treatment and/or a detriment.

49. The Claimant cited the case of *Vakante v Addey and Stanhope School* [2005] ICR 231, however this is a case where illegality was argued in a discrimination claim. It has no bearing on the Respondent's argument in relation to Paragraph 5 of Schedule 22 of Equality Act and the Tribunal find that this case is not relevant to this claim.

50. The Tribunal finds that the Respondent did not implement the CSNR as a result of the Claimant's protected act, and that Paragraph 5 of Schedule 22 of the Equality Act given the Respondent a statutory defence for implementing those rules. The Tribunal is satisfied that no future Tribunal at a full hearing of this case could come to any other decision. The Claimant's claim in respect of victimisation therefore has no reasonable prospects of success and should be struck out.

Employment Judge G. King
Date: 30 January 2023

Judgment & Reasons sent to the parties: 17 February 2023

FOR THE TRIBUNAL OFFICE