



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 13/01/2023

Claimant: Miss Y S Mok

Respondent; Fitzmaurice House Ltd t/a the Lansdowne Club

Before: Employment Judge Mr J S Burns

Representation

Claimant: Mr T Kibling

Respondent: Mr D Reade KC

JUDGMENT

1. The Claimant's application to stay the claim, pending the conclusion of separate High Court litigation, is refused.
2. The claim is struck out.
3. The Respondent's costs application is dismissed.

REASONS

For paragraph 1 above

- 1 The claim was stayed by order dated 21/6/22 until 30/9/22 but following the Claimant being given an opportunity to comment in October 22, EJ Baty lifted the stay on 18/10/22 and directed that the matter be listed for today's OPH hearing. The purpose of the hearing was described by EJ Baty as follows: "*to consider the Respondent's strike out application as set out in its letter of 30/9/22*". That letter includes (i) reasons for lifting the stay and (ii) in the last paragraph, a reference to the Respondent's strike out/deposit application as explained in the Respondent's Solicitor's earlier letter of 16/6/22. The only strike-out application which the Respondent has made is that in the June letter and it is that which EJ Baty decided should be considered today. No application to strike-out or deposit is made based on the Claimant's former solicitor's email of 18/2/22, which is referred to in the Respondent's solicitors' letter of 30/9/22.
- 2 There was no appeal against or request to reconsider EJ Baty's decision to lift the stay and no prior application to re-stay made by the Claimant before it appeared in Mr Kibling's Skeleton Argument which I received this-morning.
- 3 The main question raised by the Respondent's application is whether or not the Claimant was a worker in section 230 ERA 1996. My answering that question at this stage will not hamper, prejudice or embarrass the High Court proceedings in which that question will be irrelevant. I also do not agree that the question is one which needs to go to trial because it is fact-sensitive.

The Claimant's case and facts relevant to this question as set out in the Claimant's witness statement are taken at their highest for the OPH.

For paragraph 2 above

Introduction

- 4 I conducted an OPH to consider the Respondent's application, first notified in its ET3 and made formally by its solicitors' letter of 16/6/22, for an order striking out the claim or requiring a deposit to be paid as a condition of allowing it to proceed.
- 5 I was referred to a bundle of 305 pages and to witness statements from the Claimant and Mr Herbert (Respondent's CEO) respectively. Neither witness was called or cross-examined. I also received written skeleton arguments and oral submissions from both sides and a joint bundle of authorities.
- 6 The claim is for detriment contrary to section 47B ERA 1996. The Claimant claims that she was a "worker" pursuant to section 230(3) ERA 1996 and as such able to claim for detriment contrary to section 47B ERA 1996, allegedly received by her as a result of her making protected disclosures, which she says she made about various management decisions and financial/accounting matters within the Respondent's Club from the AGM of 29/9/2020 onwards.
- 7 The Respondent submits that the Claimant was not a worker and that the Tribunal therefore has no jurisdiction to hear this claim. It also says that the claimed PDs are not properly pleaded and that most of the claimed detriments are out of time. Its substantive defence is that the Claimant was expelled from the Club following a complaint about her conduct by a fellow member concerning her failure to abide by government regulations and guidance related to suppressing the Covid-19 pandemic, and that this had no connection to the Claimant's alleged PDs.

Assumed facts for purposes of the OPH

- 8 The Respondent operates a private members' club situated in Mayfair. It is intended to be social club for its members offering dining, recreation, sporting facilities and accommodation.
- 9 The Claimant was a member of the Club from June 2015 to 30/11/2021 when she was removed. While remaining a member she had to pay an annual members' fee. She was also elected to be a Club Council member at an AGM on 29/9/2020. When becoming a Council member, she also became a statutory director of the Respondent company.
- 10 The Council is concerned with the strategic direction and good governance of the Club. The Council constitutes the board of directors of the Respondent. Council members therefore hold the position of director whilst they are members of the Council. A person who is no longer a member of the Club can therefore neither be a Council member nor a director of the Respondent.

- 11 The Claimant witness statement (which for present purposes is to be accepted), reads as follows:

Following my appointment as a Council member on 29th September 2020 the following was required of me:

- *To be a statutory Director;*
- *To comply with the Council Member pack, the Code of Conduct, the Club Rules and Articles of Association and declare any conflict of interest or bias (includes completing and signing an annually conflict of interest form).*
- *To attend a one-day course as to my role as a statutory Director and attend any mandatory training arranged by Respondent.*
- *To attend one face to face meeting per year with the Council Chair and Club CEO.*
- *To attend a minimum number of Council meetings and not be absent from more 3 consecutive meetings without the consent of the Council.*
- *To attend the Annual General Meeting and General Meetings as required.*
- *To be available and take time to attend "Away Days" or any other adhoc and additional meetings as needed to discuss and collectively make decisions about Respondent's business.*
- *To participate as required in sub-Committees with specific purposes, such as the Nominations Committee (which is involved in selecting and presenting a short list of candidates from which Council elects the Respondent's CEO), Remuneration Committee (which recommends the compensation levels of the Respondent's Senior Management for Council approval), the Governance Review Committee (which undertakes a review of the Respondent's governance documentation and practices) and any other task as required.*
- *To prepare fully for Council meetings, reading papers and querying anything not understood giving prior notice to Chair where this is feasible.*
- *To vote at Council meetings at which they are in attendance or when requested by the Council Chair in writing.*
- *To adhere to any legal obligations that apply to the Respondent including the requirements of GDPR.*
- *To adhere to my roles and responsibilities as a Council member which are prescribed by the Club, as fully set out in its 'Council member and Treasurer Indicative Profiles' document.*

As a Council member I received valuable benefits in kind including monthly complementary lunch or dinner for two with wine (which members pay for), complimentary tickets to Respondent's keynote events (whereas members have to pay to attend), staying in a standard bedroom without charge once a year, refreshments and substantial hospitality after each Council meeting. Council members who live out of town may stay at the Club overnight after each Council meeting.

Importantly any Council member would be disqualified if in any calendar year they are absent from 4 Council meetings without the consent of the Council.

Council members were expected to represent and promote the Respondent by attendance at specific business social events, such as new members welcome drinks, member Application Panels, the Annual Chair's dinner, attending cocktail drinks and long-serving staff lunches.

Council members are individually named on the Respondent's Annual Financial Accounts filed with Companies House and distributed to the members.

The matters detailed above were akin to contractual obligations detailed in the Articles of Association, the Code of Conduct and imposed by virtue of being a statutory Director.

It is noted that there was no right of substitution of these obligations/duties. "

- 12 I was taken to paragraph 5 the Claimant's amended pleadings in her parallel High Court claim in which the Claimant avers that the Club is "*a not-for-profit members' club, managed by volunteer members for the benefit of all members, ...*" (underlining added)
- 13 I was taken also to relevant pages of the Respondent's Articles of Association, Code of Conduct for Members and its Guide For Council Members. The latter document describes the free dinners and accommodation and Council Member obligations described in the Claimant's witness statement.

Law

- 14 Rule 37 provides: "*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;*"
- 15 Strike-out is draconian and the power should be exercised only in clear cases. Even when the threshold for strike-out is passed, the Tribunal must exercise its discretion as to whether or not to do so in accordance with the overriding objective.
- 16 Section 230(3) ERA 96 provides in part;

230 Employees, workers etc.

(1)In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

- 17 Thus, the existence of contract is fundamental to “employee” and “worker” status, and that contract must be a contract for personal service.
 - 18 Holding an office is not to be equated with being a worker. Equally the fact that an individual holds an office does not preclude them from being a worker.
 - 19 A director of a company does not, as such, have a contract with the company and is not an employee. He is an officer of the company. His duties and remuneration as a director are determined by the law and pursuant to the company's constitution. He may in addition have a service contract, but that is a separate relationship.
 - 20 The relevant question was articulated by Baroness Hale in Gilham v Ministry of Justice [2019] 1 WLR 5905 considering the position of a District Judge at paragraph 16. *‘It is clear, therefore, what the question is: did the parties intend to enter into a contractual relationship, defined at least in part by their agreement, or some other legal relationship, defined by the terms of the statutory office of district judge? In answering this question, it is necessary to look at the manner in which the judge was engaged, the source and character of the rules governing her service, and the overall context, but this is not an exhaustive list.’*
 - 21 In Gilham the Supreme Court adopted a purposeful interpretation of S.230(3) based on a need to avoid an unlawful exclusion of the status of District Judges from whistle-blowing protection in breach of their rights under Article 14 read with Article 10 of the European Convention on Human Rights. A core part of the reasoning was that the exclusion of the judiciary from the protection afforded to others in analogous positions, other employees and workers, was discriminatory.
- Conclusions
- 22 It is accepted by the Respondent that the Claimant was a party to a contract namely the Respondent’s Articles of Association, which deals with company matters. This was not personal to the Claimant.
 - 23 It is also accepted by the Respondent that the Claimant’s membership of the Club involved an annual contract for membership, which was personal to her. This contract was only for a year at a time, and was subject to a requirement of annual re-election. Under this contract the Claimant paid her membership fees and would receive services but her membership did not oblige her to provide services to the Club. She was free to use whatever services of the Club she desired or not to and was free to resign her membership at any point. This was plainly not a contract for personal services by the Claimant.
 - 24 The Claimant’s submission that her appointment as Council member and Company Director constituted such a contract, is in my view not reasonably arguable.
 - 25 In her witness statement she says that *“The matters detailed above were akin to contractual obligations detailed in the Articles of Association, the Code of Conduct and imposed by virtue of being a statutory Director”*; (emphasis added) but not that, in becoming a Council member

(which carried with it the appointment of Director), she had any intention of entering into a contract with the Respondent.

- 26 She does not state that she had any specific personal contract in regard to her obligations and benefits as Council Member/Director, either in writing or oral. She has not pointed to any material which could amount to such a contract. On the contrary, she advances a positive case in the High Court that she was a volunteer in this regard. A volunteer is someone who gives their services freely and not by way of discharging a contractual obligation.
- 27 There is no need to imply such a contract because the obligations and benefits and other incidents of her acting as Council Member/Director flow from and are explained by those Offices themselves.
- 28 The obligations upon her were defined by the terms of the Office/s and Statute (so far as the directorship is concerned). They attached to the Office/s and did not arise by any personal agreement or appointment between her and the Respondent. The free food and accommodation available to Council members generally are a perk available to them as a group simply by virtue of the Club Rules and not as a consequence of any personal contract with any of them.
- 29 This was not a case of appointment through offer by the Respondent and acceptance by the Claimant. She was elected by other members to the position/s; and was free to cease performing any obligations and resign at any point.
- 30 I take judicial notice of the fact that many charities and private sporting, recreational or social clubs frequently rely on work by volunteers, which work is done by the volunteers not by way of obligation in return for the usually modest non-monetary perks which they may be given, but rather for the sake of the interest, personal development, social engagement, gratitude from others, sense of self-worth, or other similar psychological benefits which providing such service may confer on them.
- 31 To categorise such volunteer arrangements within private social and recreational clubs, as contracts under which the volunteered services were provided by way of fulfilling a contractual obligation in exchange for the perks as consideration, - so to impose employment law rights and obligations after the event,- would be contrary to how the parties understood matters while the services were being provided, and would also be a significant and unprecedented extension of the law with far-reaching negative implications for such organisations.

- 32 Hence the “overall context” also contra-indicates the Claimant’s argument.
- 33 I find that the submission that the Claimant as Council Member/Director would be entitled to a Gilham-type purposive interpretation of S.230(3) (based on a need to avoid an unlawful exclusion of particular office-holders from the right to claim for detriment under section 47B ERA 1996) also has no reasonable prospect of success.
- 34 The reason why the Claimant cannot make such a claim is because she did not have a personal contract for services, and by her own admission was a volunteer, and not because of her Office/s as Council Member/Director. Some council members and company directors (those in other companies who have appropriate personal services contracts running alongside their Offices) can make such claims. This is materially different from the Gilham-type situation in which the office of District Judge necessarily excludes all DJs from worker status (applying the normal meaning of that under section 230).
- 35 Furthermore the overall work context in which the judiciary provide their services within workplaces is significantly different from the context of a private social club.
- 36 Not striking-out will simply allow further costs to be incurred and prolong useless ET proceedings, which in my view would have only one outcome. There is nothing to be gained by either party in allowing them to continue. Therefore, I exercise my discretion to strike out the claim on the grounds that it has no reasonable prospect of success.

For paragraph 3 above

- 37 As I have found that the claim has no reasonable prospect of success, my discretion as to whether or not to order the Claimant to pay the Respondent’s costs is engaged.
- 38 The Respondent claims costs against the Claimant in excess of £40000, and a detailed assessment.
- 39 I have decided not to award costs for the following reasons:
- 40 The law in this area is complex and recent. It was not an unreasonable mistake for the Claimant and her then solicitor, when issuing the claim, to think that the Claimant might have been a worker under section 230. It does not follow (from the fact that after detailed argument and analysis of the law at the OPH today, it turns out that the claim has no reasonable prospects), that this should have been reasonably apparent on the Claimant’s side at the beginning.

- 41 There are parallel proceedings in the High Court where costs can be awarded more easily, either way. It is likely that some at least of the Respondent's costs in the ET are co-extensive with those it has or will incur in that other litigation.
- 42 I was referred to an email dated 18/2/22 sent to the Claimant by her former solicitor in which (prior to the instant ET claim being issued) he/she wrote "*To apply tactical pressure, we should commence the ACAS Early Conciliation process, which is a precursor to an Employment Tribunal Claim for whistleblowing. We have spoken about that claim having no real financial benefit, but it has strong tactical benefit, so we should keep it open,...*". The Respondent solicitor suggested in a letter of 30/9/22 that this showed that the ET claim was an abuse of process. I disagree. The author of the email was not saying that the claim had no merit. The email does not show that the claim was known to be hopeless from the start. The author was probably wrong in saying that, if successful, the claim would confer no real financial benefit, but, whether or not it would have, bringing a claim to put tactical pressure on an opponent is not necessarily abusive, and many good ET claims are brought for reasons other than financial gain.
- 43 The Claimant was a litigant in person from 24/8/22 until 21/12/22, during which period the stay was lifted and the Respondent's application proceeded.
- 44 The Claimant when serving as a Council member/Director was acting as a volunteer and, on the face of it at least, raised her queries and complaints (which she contended subsequently were PDs) not for personal gain or advancement but because she thought, rightly or wrongly, that this was her duty and in the best interest of the Respondent Club itself.
- 45 In the circumstances it is unpalatable to impose a substantial costs penalty on her.

J S Burns Employment Judge
London Central
13/01/2023
For Secretary of the Tribunals
Date sent to parties:16/01/2023
