EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	**Respondent**
Mrs Margaret Lowo		Structural Systems (UK) Limited

Held at: Watford **On:** 24 March 2017

Before: Employment Judge Southam

Appearances:

Claimants: Mr T Akinsanmi, Adviser
Respondents: Mr M Hallen, Solicitor

PRELIMINARY HEARING

JUDGMENT

1. The claimant's complaint about unfair dismissal and her claim for a redundancy payment are struck out and dismissed because, having regard to the claimant's length of service, she does not have right to bring such matters before the tribunal.

2. The claimant is ordered to pay to the respondent the sum of £250.00 towards the costs of the respondent incurred in resisting the complaints about unfair dismissal and redundancy pay.

RESERVED REASONS

Claim and Response

1. The claimant submitted this claim to the tribunal on 27 September, 2016. She did so having entered into early conciliation with ACAS, by sending

them the requisite information about her intended claim on 27 July, 2016. The ACAS certificate of early conciliation was issued by email on 27.

2. In the claim, the claimant indicated that she was bringing complaints about unfair dismissal, discrimination on the grounds of sex, that she was seeking a redundancy payment and that she was making another type of claim that the tribunal can deal with, which appeared to be a claim for injury to personal feelings and loss of earnings.

3. The claimant said that she had been employed by the respondent as a Financial Controller from 17 September, 2014 until 20 September, 2016. The attachment to the claim form consisted of a copy of a letter of appeal the claimant lodged against her dismissal. In this document, the claimant related the events of a meeting held on 13 July, 2016, when she was told that she was at risk of redundancy. She was given the right to be accompanied at the meeting. She was required, immediately after the meeting, to conduct a handover of her work and to leave the company premises. A without prejudice offer was made and she was told she was not entitled to a redundancy payment. She had expressed professional concerns about the management accounts for the period ended 31 May, 2016 recently submitted to the company as part of her work. A further meeting was set up for 20 July. The claimant was locked out of the company's IT systems. The claimant could see no sign of anyone else being put at risk of redundancy. The claimant referred to what she described as anti-female sentiment expressed by her colleagues, including male colleagues telling her not to speak while they were speaking, dismissing her opinions and ignoring health-related issues. On the basis of those matters, the claimant submitted that her dismissal was an act of sex discrimination.

4. The claim is resisted. The respondent said, in an attachment to the response form, that the claimant was dismissed by reason of redundancy by a letter dated 25 July, 2016. They disputed the dates of employment given by the claimant. They said her employment ended on 31 July, 2016, and that she did not have the requisite service to bring a complaint about unfair dismissal or to seek a redundancy payment. They also maintained that the claimant was treated exactly as a male comparator would have been treated in similar circumstances. They said that the claim for sex discrimination was misconceived and should be struck out. They contended that other examples of alleged less favourable treatment occurred at such a time that the claim was submitted out of time in respect of them, and those matters were unrelated to her dismissal for redundancy. She did not raise a grievance at the time. They wanted the claim struck out on initial consideration of the file by an employment judge, or, failing that, at a preliminary hearing.

5. The respondent went on to say that the claimant's redundancy resulted from a decision to reorganise the finance function across the respondent's holding companies and subsidiaries, and it was proposed that her role be eliminated with effect from 31 July, 2016. The decision was taken because the business was losing money. There was a formal consultation

process with the claimant, beginning with the meeting to which the claimant referred on 13 July, 2016. The claimant was, they say, told that she would be given paid time off in order to consider her response to the proposal. A second consultation meeting took place on 20 July. This was a continuation of the consultation process and was for the purpose of the claimant giving her response to the proposal so that any suggestions she had to make could be considered. The final consultation meeting was on 25 July. The claimant did not attend because of illness. The only proposal the claimant had made was to dismiss an agency temporary worker. The respondent decided this was not a viable alternative. There was no suitable alternative work for the claimant to do and the decision was therefore made to terminate her employment by reason of redundancy. The claimant was informed, and told of her right to appeal against the decision to dismiss her. The claimant did appeal, and the appeal hearing was conducted on 19 August, 2016. The claimant had an external representative. The decision to dismiss her appeal was sent to her in a fully reasoned document on 2 September, 2016.

Case Management

6. In view of the complaint of discrimination, this claim was listed, in accordance with standard practice, for a preliminary hearing for case management purposes on 8 December, 2016. After the filing of the response form, the claim was considered by Employment Judge Manley under rule 26 Employment Tribunals Rules of Procedure 2013. She decided that there should be a preliminary hearing for the purpose of considering whether or not all or part of the claim should be struck out, and she directed that the claimant be asked whether she agreed that she did not have the requisite two years' service in order to bring a complaint about unfair dismissal. That was done on 4 November. The claimant's representative wrote to the tribunal to say that the claimant did have the requisite service because, as at 8 November, the date of the letter, the respondent had still not completed the internal process. There was to be a further appeal, not yet set up.

7. This correspondence was referred to Employment Judge Henry, who directed that the parties be informed that, unless there was a contractual provision which permitted employment to continue during the appeal process, the claimant's employment appeared to have been terminated on 31 July, 2016. If that was right, the claimant did not have the necessary service to bring her complaint about unfair dismissal. The claimant was directed to reply by 12 December, 2016. He appeared to have overlooked that there was to be a preliminary hearing on 8 December. The parties attended that hearing, before Employment Judge Bedeau, who decided that there should be a further preliminary hearing, this time in public, to determine the following questions: whether some or all of the claims have no reasonable prospect of success and should be struck out, and whether some or all of the claims have little reasonable prospect and if so, whether deposits should be ordered before the claimant is allowed to continue with her claims against the respondent. He directed that any witness

statements should be served by no later than 10 March, 2017. He fixed the further preliminary hearing to take place today.

Preliminary Hearing

8. The preliminary hearing was listed before me. The claimant's representative told me that he has a degree in law and advises on employment cases. He is also partially sighted. Despite this difficulty, he was able to present his client's arguments before me.

9. At the start of the hearing, I suggested and the parties' representatives agreed that the purpose of the hearing was to determine two questions. First, I had to decide whether or not the claimant had sufficient length of service in order to bring her complaint about unfair dismissal and her claim for a redundancy payment. The issue in the case was whether her employment extended beyond the date when it was apparently terminated, which was 31 July, 2016. It might be necessary for me to hear evidence in respect of that question, although in the end, I was referred to some documents, and I did not hear evidence.

10. The second question I had to determine was whether or not the claimant's complaint about sex discrimination had no or alternatively little, reasonable prospects of success. It would not be necessary for me to hear evidence in relation to the prospects of success complaint of sex discrimination because, as I agreed with the parties' representatives, an assessment of those prospects could be made on the basis of the content of claim form and on the assumption that the assertions contained there are true.

11. It occurred to me on reading the claim form that the claimant might have been suggesting that her dismissal was because she made a protected disclosure of information to her employer about something in the accounts of the business for the year ended 31 May, 2016. There was insufficient information in the attachment to the claim form and, on discussion of the matter with the claimant's representative, he made clear that there was no such complaint before the tribunal and he would consider with the claimant whether or not to submit an amendment to the claim by which such a claim would be advanced. It followed that, if I dismissed the complaint about unfair dismissal on the basis of length of service, there would be no complaint of unfair dismissal before the tribunal, unless the claimant submits an application to amend the claim.

Analysis

<u>Unfair Dismissal and Redundancy</u>

12. The claimant's case as to length of service was that, despite the fact she had said in the claim form that her employment ended on 20 September,

2016, it in fact ended on 30 September, so that she would have accrued more than two years' service by the date of her dismissal.

13. The key evidence about this was contained in two documents. The first was the letter by which the claimant was appointed to the position as Financial Controller on 17 September, 2014. This document appeared at page 8 a-c in a bundle which had been presented at the previous hearing and which was available for me to consider. This document showed that the claimant's employment began on 22 September, 2014. The letter is dated 17 September, 2014, and that is the date on which the claimant stated, in her claim form, that her employment commenced. The other significant information in the letter is at clause 12, which provided that the contract of employment could only be terminated by notice in writing of two calendar months once the claimant had completed a three-month probation period. The letter does not contain any provision whereby the company is entitled to make a payment in lieu of notice.

14. The other key evidence was the letter of dismissal, which was dated 25 July, 2016, and which appeared at page 18 in the bundle. Here, the letter contained the following important statement:

> "As a consequence, the company has decided to go ahead with making your position redundant with effect from 31 July, 2016. You will be paid your wages and contractual benefits up to this date. Thereafter, the company will pay you two months pay in lieu of contractual notice as previously outlined to you during the consultation process".

15. There followed a list of payments which would be included within the claimant's salary for July. As well as basic pay for July, the claimant would be paid two months' notice pay and travel allowance and there would be pension deductions and employers' payments for a similar period. The claimant would be paid 13 days' holiday pay and her BUPA private health cover would remain in place until 30 September, 2016.

16. Mr Hallen, for the respondent, submitted, on the basis of those documents, that it was clear that the employment ended on 31 July, 2016 and that what the company was doing, bearing in mind that there was no provision in the contract for there to be a payment in lieu of notice, was offering to pay the claimant, in effect, damages for the fact that she was not given the two months' notice to which she was entitled. That was the explanation for the continuation of pension payments and BUPA membership.

17. He relied on the case of Adams v GKN Sankey Ltd [1980] IRLR 416 for a discussion of the difference between a situation where an employee is dismissed with notice, but is given a payment in lieu of working out that notice, where the employment continues until the end of the notice period and the case were no notice of dismissal is given, but a payment is made in lieu of notice, where dismissal takes effect immediately it takes place. Here, he submitted, the claimant was given short notice expiring on 31 July, 2016, and the respondent compensated the claimant for her losses

by making payments in lieu of what she would have received during the notice period.

18. The submissions on behalf of the claimant were that the making of payments beyond 31 July made it clear that her employment continued beyond that date also. Mr Akinsanmi submitted that that was the only explanation for the continuation of the BUPA membership and pension contribution.

19. I accepted the respondent's submissions. This is clearly a case where the employment ended at the end of a short period of notice, which was much less than the notice to which the claimant was entitled under her contract of employment. The payments which the respondent offered were payments by way of damages for their failure to give the claimant the notice to which she was entitled. My conclusion is that the claimant's employment ended on 31 July, 2016. She did not complete two years' service in her employment by the respondent and she is therefore not entitled to pursue a complaint about unfair dismissal or a claim for a redundancy payment.

Sex Discrimination

20. I then considered the sex discrimination complaint. I decided not to strike it out. But the claim requires, in my view, further particulars, although, in the end, it will be a matter for the claimant and her representative as to whether or not to file further information.

Further Case Management

21. In view of the uncertainty as to whether or not the claimant intended to pursue a complaint that her dismissal was because she made a protected disclosure, and of the possibility that the claimant might take the opportunity to provide further information in support of her sex discrimination complaint, I decided not to list this case for a hearing, but instead to await developments. The length of any full merits hearing cannot be determined at this stage nor could the issues be agreed definitively for the purposes of such a hearing. I cannot direct the claimant to file any amendment to her claim by any particular date. She has the right, as any party does, to make such an application at any stage of the proceedings. Nevertheless, I encourage her, if she intends to make such an application, to do so as soon as possible, preferably within the time that I allowed her to deliver further information in support of her sex discrimination complaint.

22. Thereafter, I encourage the parties to see whether they can agree on the length of any full merits hearing and the directions that might be given to ensure that the parties prepare for such a hearing. The issues the tribunal would have to decide can similarly be determined and directions could be given on paper, without a hearing. In this respect, I bear in mind that there have already been two preliminary hearings, and I am anxious to avoid the parties incurring unnecessary further costs at the interlocutory stage.

23. I therefore made the case management order, which appears below.

Costs

24. After I had done that, Mr Hallen made an application for costs. He submitted that the complaints about unfair dismissal and redundancy pay had no reasonable prospect of success and that, furthermore, the claimant and her representative were in a position to appreciate that that was the position at least after the last hearing, when the bundle of documents containing the documents to which I referred above were available to them. He pointed out that it had taken two preliminary hearings for the question of length of service to be determined. Only one of those hearings was necessary in relation to the length of service question, although he conceded that the hearing today was necessary still in relation to consideration of the prospects of success of the sex discrimination complaint. He said that he had spent two hours in preparation for the hearing, travelling to and from the hearing was a further two hours and the hearing itself lasted two hours. On that basis he sought payment of costs in the sum of £1000, based on an hourly rate of £175. Mr Hallen does not charge VAT.

25. For the claimant, Mr Akinsanmi said that it would be wrong in principle to make a costs order. The question I had to decide, he said, was based on probability. The claimant had reasonable grounds to submit that she had sufficient service to bring a complaint about unfair dismissal. The letter of termination was, he submitted, not clear. He reminded me that I had assessed the claimant's ability to pay in respect of another aspect of the claim, and that I should take that information into account when considering, should I decide to make a costs order, how much the order should be. I was grateful to him for that submission.

26. Rule 76 Employment Tribunals Rules of Procedure 2013 provides that a tribunal may make a costs order, and shall consider whether to do so where it considers that a claim had no reasonable prospect of success. I found that the complaints about unfair dismissal and redundancy pay had no reasonable prospect of success. I am therefore bound to consider whether or not it is appropriate to make a costs order against the claimant.

27. I took into account that the costs application related only to the second of the two preliminary hearings. I came to the view that, once the claimant had seen what the respondents said in the response to the claim and had assembled the documentation that she did assemble for the purposes of the first preliminary hearing, with the benefit of legal advice, the claimant should have known that her complaint about unfair dismissal and her claim for a redundancy payment had no reasonable prospect of success. The position would be different if the claimant did not have the benefit of legal advice. Here, her adviser has a degree in law and has experience in advising in employment cases. There was therefore no reason for her not to appreciate that the claims had no reasonable prospect of success.

28. In those circumstances, and bearing in mind the evidence I had as to the claimant's means, I took the view that it was appropriate to make an order for costs and that the claimant should be ordered to pay the sum of £250 towards the respondent's costs. An attendance today was always going to be necessary for submissions to be made in relation to the sex discrimination complaint, so the costs of today's hearing were not entirely wasted and it would not be appropriate to order the claimant to pay the whole of those costs on the basis of the decision that I made today.

ORDER

Made pursuant to the Employment Tribunals Rules of Procedure 2013

Further Information

The claimant is permitted, if so advised, to file further information in support of her complaint of sex discrimination, so as to show what facts she will seek to prove in order to show that her selection for redundancy was, at least in part, because she is a woman, provided she delivers the further information to the respondent and to the tribunal by **21 April, 2017**.

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Employment Judge Southam

Date: 4 April 2017

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE