Case Number: 2301220/17

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MARTIN**

BETWEEN: **Ms Sonia Couto** **Claimant**

AND

Mitie Cleaning and Environmental Services Ltd
Respondent

REASONS FOR THE TRIBUNAL'S JUDGMENT

Sent to the parties on 5 June 2018 and provided at the Claimant's request.

1. This is an application by the Respondent to strike out the Claimant's claim on the basis that it has no reasonable prospect of success or alternatively for a deposit order to be made on basis that is has little reasonable prospect of success. In given these reasons not all documents which were referred to are discussed. These reasons are limited to those matters which relevant and necessary to explain the decision.

2. The Employment Tribunal Rules of Procedure rule 37deals with strike out applications and rule 39 deals with deposit orders. The relevant parts of these rules are set out below:

3. Rule 37

Striking out

37.—(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;

……/

(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.

4. Rule 39

Deposit orders

39.—(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.

5 The sole issue in this case is whether the provisions of Agenda for Change ("AFC") were incorporated into the Claimant's contract of employment. To determine this, I need to establish what the Claimant's contractual terms were, how they evolved and what was transferred on the TUPE transfer to the Respondent. There is no dispute that AFC was not part of the Claimant's contract when she joined the Respondent in 2007. Her terms and conditions are set out in a letter dated 28 February 2007. The Claimant is unable to pinpoint the date she says AFC were incorporated into her contract saying it occurred sometime between 2008 and 2009, prior to the TUPE transfer to the Respondent on 1 April 2009.

6 The Respondent explained that there are differences in contracts of staff working at the same place as there is a difference in the terms and conditions of staff who transfer to them by TUPE transfer from various sources. The Respondent accepts that some of the Claimant's colleagues have AFC terms and conditions of employment.

7 As with many contracts of employment there were variations to some of the terms, in particular, those relating to pay and hours or work which are the type of variation changes to be expected in an ongoing employment relationship. These changes are reflected in the letters I have been taken to. I have to consider what the status is of these changes. I find that they are variations to the original contract set out in the offer letter to the Claimant dated 28 February 2007.

8 I was taken to a letter addressed to the Claimant from St George's Healthcare, Iss Mediclean and the union dated 2 December 2008 which makes reference to Agenda for Change payments and makes reference to full payments being made on the start of the new Domestic Contract in 2009. Given this letter refers to hourly rates and a one-off bonus, I do not interpret it as being full implementation of AFC. It relates only to hourly rate, which it appears was not fully paid at that time, as it refers to interim payments. This is not determinative of AFC being incorporated into the Claimant's contract especially when read with the letter of February 2009 set out at paragraph 9 below. This was the start of a process which had not been completed. For completeness this letter says:

"Following negotiations between the Trust, Unison and Iss Mediclean, we are very pleased to announce that an agreement has been made for a set of interim payments to be made for staff working for Iss Mediclean.

These payments will be made as detailed below:

1. ***A one off taxable bonus payment of £500 pro rata (already paid in September 2008) for staff working up to the end of 1st Ppril 200 including those who had left and those on maternity leave.***

2. ***An increase in the hourly rate for all staff of £6.40 plus high costs area allowance of £1.81 per hour (paid up to a maximum of 37.5 hours as per Agenda for Change) and appropriate uplift for Supervisors. This will be processed at the end of November 2008 but will be backdated to the 1st November 2008. Payment will be made at the beginning of December.***

All other current overtime, bank holiday payments and sickness payments will be paid as per your current contract.

The full agenda for change payments will then be made on the start of the new Domestic Contract."

9 I have been taken to page 45 by the Claimant. This is a document dated 29 Feb 2008. This states:

"ISS Mediclean is not aware of any ballot taking place with out staff at St George's Hospital and therefore any industrial action taken on Friday 7th March 2009 would be illegal and any staff taking part could be dismissed. ISS Mediclean has a national agreement with UNISON to jointly press for the full implementation of Agenda for Change for all our staff. This is for your benefit not ours so we are surprised that you would want to consider action outside the spirit of this joint agreement."

10 The Claimant relies on this to support her claim that AFC is incorporated into her contract. I do not find that this assists the claimant as it does not say or mean that there was incorporation of AFC at this stage - it just says that the Respondent would press for full implementation jointly with the union. This is an aspiration only.

11 When Mitie took over the contract on 1 April 2009 from ISS, it wrote to ISS staff on 27 April 2009 saying that their terms and conditions will be ***'broadly comparable***' to AFC. This does not incorporate AFC, it does what it says, i.e. that the terms and conditions would be broadly the same but not exactly the same. The Claimant's previous contract transferred automatically on 1 April to Mitie. This was her 2007 offer letter, plus the change to pay and hours already referred to.

12 I accept it is difficult when colleagues are on differing terms and conditions of employment and this can lead to resentment. However, what I am concerned with are the contractual terms relating to the Claimant. I have disregarded the letter from Mr Miguel brought by the Claimant as he says in it he had no knowledge of the Claimant's contractual terms. The Respondent accepts some staff were employed on AFC terms and conditions.

13 The Claimant raised this issue with the Respondent in a letter clearly setting out her concerns. The Respondent met with the Claimant and explained that staff were on different contractual terms and the reason for it – namely the different contracts of staff transferring to them. The Claimant was accompanied

by her union representative at that meeting.

14 The Claimant also refers to a letter dated 2 February 2015 from the Respondent, addressed to Mr Tom Hughes. This letter deals with matters in relation to his contractual terms which are not necessarily the same as the Claimant's. In any event, this letter refers to 'all band two employees on Agenda for Change Terms and Conditions of Employment". The Claimant was not on AFC terms on transfer and I cannot see any time after transfer when those terms were incorporated.

15 In order for a term to be incorporated (ie not being an express term) the law sets out when this can occur by way of collective agreement which is not relevant here, business efficacy which is also not relevant. Because of something specific to a certain industry which is not relevant here as there are express terms.

16 The Claimant in the submissions made on her behalf says that in the absence of a definition of 'broadly comparable with AFC terms' then AFC terms were incorporated. This cannot be correct. What I see from the documents before me is a contract from 2007 which does not incorporate AFC; the normal types of variations to that contract and what are no more than aspirations on the part of ISS and then Mitie, that all staff would be subject to the full benefit of AFC. These aspirations were not realised, and AFC was not incorporated into the contract.

17 I find that there is no reasonable prospect of the Claimant's claim succeeding. Her claim is a contractual claim and oral evidence will not enhance her case. The Claimant was given the opportunity to present all documentation to this hearing, indeed the previous hearing was adjourned to allow her to do this. The documentation produced does not assist her in her claim. Her claim is therefore struck out.

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Employment Judge Martin
Date:10 October 2018