Case no: 2205711/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs D Iaghanashvili	**v**	**LNA Trading Ltd**

Heard at: London Central **On**: 17 April 2019

Before: Employment Judge Lewis

Representation

For the Claimant: In person

For the Respondent: Mr J Davies, Counsel

PRELIMINARY HEARING RESERVED JUDGMENT

1. The following claims are struck out because they have no reasonable prospects of success:
    a. Failure to comply with the Flexible Working procedures – Employment Rights Act 1996 s80F-H and Flexible Working Regulations.
    b. Automatic unfair dismissal (or constructive dismissal) under s104C Employment Rights Act 1996 in respect of the Flexible Working procedures.
    c. Breach of contract and/or unauthorised deductions in the failure to sell the business by 2018 and provide the claimant with half the sale price.

2. The following claims remain:
    a. A claim for 50% of the respondent's profits by way of breach of contract and/or unauthorised deductions. The claimant quantifies this claim as £21,629.34.
    b. Holiday pay
    c. Failure to provide a s1 statement of terms and conditions.

3. It is now necessary to fix a hearing date (possibly 3 days to give the tribunal enough time to reach a decision) and what is needed by way of

preparation. The parties must try to agree the length of the hearing and a time-table for the preparatory steps. They should write into the tribunal with these within 14 days or alternatively stating if they cannot be agreed and a further preliminary hearing is needed.

REASONS

The claims and issues for the preliminary hearing.

1. This preliminary hearing was to decide whether the following claims should be struck out because they have no reasonable prospect of success or alternatively whether a deposit should be ordered because they have little reasonable prospect of success:
    a. Breach of the Flexible Working rules (ERA 1996 s80F-H and Flexible Working Regulations)
    b. Automatic unfair dismissal for making an application under the Flexible Working rules (ERA 1996 s104C)
    c. Unauthorised deductions
    d. Breach of contract.

2. It was agreed that the holiday pay claim can be dealt with at the full merits hearing. The respondent will dispute that the claimant was entitled to holiday from previous years.

3. By consent, the claim was amended to include a claim for failure to provide a section 1 statement of terms and conditions.

4. By consent, the name of the respondent was amended to add the word ‘Ltd’.

The Flexible Working claim

5. The claimant claimed breach of her right to claim flexible working under s80F of the Employment Rights Act 1996. The respondent said her claim would not succeed because (i) she had not been an employee for at least 26 weeks, (ii) the respondent did not fail to comply with the requirements of the Regulations and (iii) the claimant did not make a request as described in the ERA 1996 and Regulations, so they did not apply in any event. For today, the respondent only wished me to consider point (iii) as it recognised points (i) and (ii) would require evidence.

6. The claimant’s request was made in emails written in Georgian. These have been translated. The respondent said there was no significant difference between their translation and the claimant’s.

7. Under reg 4 of the Flexible Working Regulations 2014, an application for flexible working must be made in writing, be dated and state whether any previous application has been made. Under s80F(2) of the Employment Rights Act 1996, the application must also
    (a) state that it is such an application,

(b) specify the change applied for and the date on which it is proposed the change should become effective, and
(c) explain what effect, if any, the employee thinks making the change applied for would have on her employer and how, in her opinion, any such effect might be dealt with.

8. The claimant raised the possibility of reduced days and home working orally on 24 April 2018 and there was a discussion. Unfortunately, an oral discussion does not fall under the procedure. The claimant never made a written application which met all the statutory requirements. On 30 April 2018, she sent an email saying she had decided to leave after the meeting on 25 April 2018 'because my offer to work 4 days a week (2 days at the office and 2 days from home) was categorically refused …' This did not state that it was an application for flexible working or say if there had been any previous application or explain what effect such a change might have on the employer and how that could be dealt with. It did not say when the change should become effective.

9. As the claimant did not write an application in the required form, she did not trigger the flexible working procedure. Her claim for breach of the procedure therefore has no reasonable prospects of success and is struck out.

Automatic unfair dismissal under s104C

10. Under s104C of the Employment Rights Act 1996, it is automatic unfair dismissal if the reason – or principal reason – for dismissal of an employee is that she made or proposed to make a flexible working application under s80F.

11. For reasons already explained, the claimant had not made a flexible working application under s80F. Therefore she could not have been dismissed (or constructively dismissed by the refusal) as a result.

12. The claimant has not suggested she was (constructively) dismissed because she *proposed to make* such an application and it is hard to see any evidence for that or how it would sensibly work.

13. This claim is therefore struck out as having no reasonable prospects of success.

The unauthorised deductions / contract claims

14. On 15 February 2019, the claimant provided further particulars of these claims pursuant to EJ Hodgson's order on 28 January 2019. The claimant says there was an oral contract in around November 2016 that she would be employed by the respondent from 8 November 2016 to acquire and then manage the Igloo Kids Retail chain and that she would be paid a net monthly salary of £1500 plus 50% of the respondent's profits. The claimant was paid the £1500 monthly sums but not any profit share. The respondent says there was no profit and also that it is unclear how profit should be calculated. In particular, whether it should take account of loans to the company made by

Mr Merabishvili. The claimant says that the respondent was not entering correct figures in the accounts.

15. The claimant says that she was employed from 8 November 2016 to 26 April 2018 in performance of this contract. The respondent denies that she was an employee prior to the date originally put by the claimant on her ET1 as the start of her employment, ie 12 January 2018. The claimant says she put that date because that was the date she was put onto the payroll. However, she says she was doing the same duties throughout.

16. The claimant also states that a second contract was entered into on 2 May 2018, when she orally accepted an email from Mr Merabishvili on that day. She says the terms of that agreement were that the respondent would seek to sell Igloo Kids by the end of 2018 and that she would be entitled to half the sale price. The respondent argues that this alleged contract post-dated the termination of the claimant's employment and also that it is not wages or connected with employment.

17. There is a dispute regarding the termination date. In her ET1, the claimant noted that it was 20 May 2018. She also showed me a payslip dated 20 May 2018 and a P45 noted 20 May 2018 as the termination date. The respondent says the termination date was 26 April 2018 and that the claimant accepted at the last preliminary hearing that she had not returned to work after 26 April. The claimant says that she had not returned to the shop after that date, but she had had subsequent meetings with and on behalf of Mr Merabishvili for which she was paid. This is a matter which requires evidence and I cannot make any finding on it today.

The contract claim

18. A contract claim in an employment tribunal must fall within the description of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. This Order is made under s3 of the Employment Tribunals Act 1996.

19. The respondent argued that the claims under each contract cannot be brought because they do not involve breach of a contract of employment or a contract connected with employment (see s3(2) of the Employment Tribunals Act 1996). They also stated that the second contract was agreed after the termination of employment and therefore falls foul of reg 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, which says that the claim must arise or be outstanding on the termination of the employment of the employer against whom it is made.

20. I agree that a claim cannot be brought based on the second contract ie for the business to be sold and for the claimant to share the sale price. This is not a contract of employment or a contract connected with employment. It is a business agreement. I therefore strike out this part of the contract claim.

21. I think it is arguable that the arrangement entered by the claimant in an oral agreement at the outset involved employment as well a business agreement. Failure to pay the profit share could potentially amount to a breach of a contract of employment or a contract connected with employment. The facts are too detailed and complicated for me to make any assessment at this stage. However, the claimant was on the payroll from 12 January 2018. She says her job remained the same as it was before that. There were discussions about ways of paying her and whether this should be by way of a flat wage or profit share, both before and after 12 January 2018. I therefore do not strike out the contract claim based on the first contract ie for profit share during employment, nor do I order a deposit.

The unauthorised deductions claim

22. The respondent argued that the claims under each contract cannot be brought as an unauthorised deductions claim, (i) because they are not for 'wages' and (ii) because they cannot be clearly quantified (see Coors Brewers Ltd v Alcock [2007] ICR 983, CA.)

23. I strike out the unauthorised deductions claim in respect of the second contract because it was not for wages nor is it in any way quantifiable.

24. I do not strike out the unauthorised deductions claim for the first contract. Depending on the evidence, it may be found to be a claim for wages. Moreover, on the facts, it is potentially quantifiable and thus different from the situation in Coors.

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Employment Judge Lewis
18 April 2019

Sent to the parties on:

23 April 2019

For the Tribunals Office