EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms V Jessop	**v**	**Mihomecare Limited**

Heard at: Watford **On**: 3 May 2019

Before: Employment Judge Manley

Appearances

For the Claimant: In person
For the Respondent: Mr Boyd, Solicitor

PRELIMINARY HEARING JUDGMENT

1. The date of the end of the claimant's employment was 1 March 2014. The claimant was not dismissed.

2. It is not possible for there to be a fair hearing of the public interest disclosure detriment claim and that claim is struck out.

3. Even if that claim had not been struck out because a fair trial is not possible, it has no reasonable prospect of success and would have been struck out for that reason.

4. It is not possible to say that the unlawful deduction of wages/breach of contract claims have no or little reasonable prospects of success.

5. Those claims continue to be determined for one day on the first day of the already listed on **Monday 8 July 2019** at 10am.

REASONS

Introduction and issues

1. At a hearing on 21 September 2018, the default judgment made in May 2018 was revoked. The respondent had already made payment of the amount of £6,160 to the claimant under that judgment. A case management summary was prepared and sent to the parties after discussion at that

hearing. This hearing was a preliminary hearing to determine the following issues:-

1 *Whether the date of the end of employment can be determined and, if so, whether there was a dismissal;*

2 *Whether the employment judge considers that it is no longer possible to have a fair hearing in respect of the claim for public interest disclosure detriment and whether that claim should be struck out under rule 37 (1) e) Employment Tribunal Rules of Procedure;*

3 *Whether the claim for public interest disclosure has no reasonable prospect of success and should be struck out under rule 37 91) a) Employment Tribunal Rules of Procedure;*

4 *Whether any of the unlawful deduction of wages/breach of contract claims have no reasonable prospect of success and should be struck out;*

5 *Whether any allegations or arguments have little reasonable prospect of success and a deposit should be ordered as a condition of those allegations or arguments being allowed to continue;*

6 *Any other jurisdictional issues of which due notice has been given to the parties;*

7 *Any further case management matters.*

2. The issues for the full merits hearing, listed for three days in July, were set out then and it is sensible to repeat them here:-

*7 The **claims and issues** for the purposes of consideration at the PH are now clarified and are recorded as being as follows:*

<u>Public interest disclosure detriment</u>

Did the claimant make the following qualifying disclosures?

i) In a letter to Mrs Robinson (undated but believed to be around 31 July 2013);

ii) In a letter to Mr Felton (undated but believed to be around early September 2013)

1) Did she disclose information which, in her reasonable belief, was made in the public interest and tends to show one of the matters set out in s43B ERA 1996?

2) If so, did she suffer the following detriments because she made any of these disclosures;-

i) The removal of her desk and chair;

ii) Hostile treatment from her team members, Vicky Mygaha and Martina Graham, calling the claimant a bully and complaining about information she had given the respondent;

iii) Being effectively demoted around 7 August 2013 as the claimant had been team leader but her staff were told to report to the deputy manager;

iv) Suspension of the claimant by phone by her line manger Ian Thomas on 23 August 2013 for an allegation of throwing a care plan in the bin;

v) Being subjected to an investigation of the allegation in September 2013 and the disciplinary process being handled unfairly.

Unpaid wages

3) Did the claimant received all sums that were due to her over the course of her employment?

i) By way of wages between August 2013 and April 2014;

ii) By way of holiday pay (the claimant has calculated she is entitled to 25 days holiday)

iii) By way of overtime payments calculated at 10 hours at £25 per hour;

iv) By way of on-call payments for three weekends at £100 per weekend (total £300)

v) By way of pay for staff training at £100 per hour (total £250)

3. Case management orders were made for this hearing. There were disputes about compliance with those orders but it was possible for the matter to proceed. The claimant wished to rely on the document which is contained within the bundle called the "Antecedent Report" at page 54, which I took as her witness statement. There was also a witness statement from Mr Jeffers, who is the HR Director of the respondent. I also had a bundle of documents of 174 pages.

4. At one point in the proceedings, the claimant referred to having access to an e-mail of 31 July 2013 which is mentioned at 7(i) above. With the assistance of the respondent's solicitors and their computer, the claimant did find a document, which is not an email but might be an attachment to an email and it now appears that the bundle of pages at 175 and 176. It is undated.

Facts

8 The claimant began employment with Enara Care Agency (which was later transferred to the respondent) on 7 May 2013. At that point Enara was a wholly owned subsidiary of Mitie Group plc. The claimant provided the names of several people she had dealings with over her relatively short employment. In particular, she mentioned Sonia Simms who she said was the Regional Director. Her statement says that she raised concerns about care plans and several other matters starting shortly after she started working there.

9 On or around 31 July, the claimant says that she sent an e-mail with the attachment which now appears at page 175 of the bundle to a Mrs Robinson. She says that she was told the name of Mrs Robinson by someone at the then respondent's office but she does not know her position or why she sent it to her. In any event, she was then told by someone who she believed to be Mrs Robinson's secretary, that she should send it on to a Wayne Felton which she did by e-mail which appears at page 65 of the bundle. This is again undated, but her case is that she sent it to Mr Felton either late August or early September 2013. In that document, the claimant raises concerns about a number of matters, including being told that she was suspended on 23 August 2013.

10 It seems that the claimant was suspended between 23 August 2013 and when her employment came to an end on 1 March 2014. The claimant told me that there was a conversation with HR at some point about the possibility visiting her mother who was abroad and was unwell and that she was told it would have to be taken as unpaid leave. However, the claimant tells me she was not able to travel. The pay statements which the current respondent has managed to get from Mitie, indicate that there was a gap in the claimant being paid that which would amount to her full pay over the whole period.

11 There was a disciplinary hearing on 5 March which the claimant attended. A letter at page 70 of the bundle informed the claimant that no further action would be taken with respect to the matter for which the claimant was suspended. The letter also records "*I know you have now left the company …".* The respondent has been sent a copy of a "staff leaver form" which shows 1 March 2014 as the date of leaving. In evidence the claimant said she did not know when her employment came to an end, that she was not dismissed and did not resign.

12 The claimant presented her claim form on 25 April 2014. It is not clear from the tribunal file when this happened but the claim was struck out for non-payment of fees at some point. On 6 December 2017 the claimant was offered reinstatement of that claim after the Supreme Court judgment on tribunal fees and she asked for the claim to be reinstated.

13 What had happened in the meantime, was that in February 2017, a company called Apposite purchased the share capital of Enara Group and so the respondent is now therefore a different legal entity. Because a response was not filed, a default judgment was issued with the sum for unpaid wages assessed at £6160 and any compensation for public interest disclosure listed for determination at a hearing. The respondent made an application to present a late response and for revocation of the judgment as set out above. During that preliminary hearing on 21 September, we spent some time discussing and then setting out the claimant's claim as set out above.

14 Mr Jeffers, who was present at that hearing, also agreed to do as much research as he could before this hearing to find out details of what happened during the claimant's employment. The result of what he found

out is set out in his witness statement. Mr Jeffers sought information from Mitie's in-house legal department but all they were able to supply, in summary, was pay records and a few emails. The respondent's solicitors also sought information, but nothing further was forthcoming. None of the people named by the claimant were transferred as employees on acquisition by the current respondent and did not appear on the payroll. The respondent has not been able to conduct any of them because they do not have anything other than their names. The respondent has no further information on the public interest disclosure claim.

15 Turning then to the unlawful deduction of wages claim, Mr Jeffers sets out in some detail between paragraphs 17 and 18 of his witness statement, the difference between what it seems the claimant should have received and what she did in fact receive. His calculation is that she might be entitled to a sum of £4,528.17 as an underpayment of wages. The respondent does not accept that the claimant is entitled to further payment for holiday pay because of the content of copy e-mails shown at page 125 and 128 of the bundle, which indicate that the claimant had been overpaid with respect to holidays. As far as any other payments are concerned, there is no evidence which shows any overtime was agreed by management and the claimant has not been able to explain how that was agreed to.

16 Since the revocation of the judgment the respondent has sought the return of the £6,160 from the claimant and take the matter to the civil courts but it has not received that sum from the claimant.

Law and submissions

17 I am considering matters under general legal principles with respect to the date of employment and dismissal.

18 My consideration of whether to strike out any or all of the claims is governed by Employment Tribunal Rules of Procedure 2013 which include the overriding objective at regulation 2 to deal with cases fairly and justly. The relevant parts of Rule 37 on Striking Out reads as follows:

"(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;
b) -;
c) -;
d) -;
e) that the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)"

19 I have been referred by the respondent's representative to several cases which provide guidance with respect to when a final hearing might not be possible. These are Peixoto v British Telecommunications plc [2007] EAT

0222/07 and Riley v Crown Prosecution Service [2013] IRLR 996. I must consider the balance of prejudice to the parties. In these cases, the health of a party had led to delays which is not the case here. This is a very unusual situation where neither party is to blame for the delay and the difficulty in finding necessary evidence. It will only be in rare situations where a tribunal might say that a fair trial is not possible. The respondent accepts the claimant is not to blame but submits that neither is it to blame. It accepts it has some information on the unlawful deduction of wages point.

20 The claimant made submissions which were, in summary, that she felt that things had happened to her because of the whistleblowing, that she was right to blow the whistle, that it had had a very serious effect on her health which had affected her ability to find work. She believes that it is right for the tribunal to consider that claim. She did not address me on the unlawful deduction of wages point.

Conclusions

21 There is no question that the end of employment was 1 March 2014. That is the date the claimant put on the claim form when it was presented not much later in April 2014. That is also the date on the staff leaver form. The respondent agreed with that date and, as quoted above, there was reference to the claimant having left already by the time the May letter was sent to her. The claimant has suggested no other date when the employment ended. As far as whether there was a dismissal is concerned, the claimant herself stated that she was not dismissed, and she did not resign. In these circumstances, I must find that there was no dismissal and that the employment ended on 1 March 2014.

22 As for the question of whether a fair trial is still possible, I have looked at this very carefully. I appreciate that the claimant feels strongly that she made a public interest disclosure. Indeed, on the face of the documentation before me, it is quite possible that she would be able to show that there were disclosures made in the public interest. However, these are undated documents, made to people who cannot be found. The detriments which were set out in the previous case management summary (at paragraph 2 above) are ones which a tribunal would need to hear evidence on from the people involved.

23 The claimant is not to blame for the delay here which was caused by the imposition of tribunal fees, later found to have been unlawful by the Supreme Court. These are very unusual circumstances but, when I balance the prejudice to both parties, I am bound to find that a fair trial of this public interest disclosure detriment claim is simply not possible. There is very little documentary evidence apart from those undated letters and potential witnesses cannot be identified. In these unusual circumstances, a tribunal could not consider the matter fairly and justly. The public interest disclosure detriment claim cannot proceed and is struck out under Rule 37 (1) e).

24 Although it is not strictly necessary, I turn to consider the alternative question of whether that claim had no reasonable prospect of success under Rule 37

(1) a). When I consider the claimant's case on public interest dislcosure, I have come to the judgment that, even if a fair trial had been possible, she has no reasonable prospect of success in that claim. She is unable to prove the date of the document sent to Mrs Robinson, and would be unable to satisfy the tribunal as to who Mrs Robinson is or was. Even if she could show that such a document went to a Mrs Robinson, she has not suggested that any of the people who were responsible for what she alleges as detriments had any knowledge of that document. Indeed, on her evidence today, she said that she was asked by Mrs Robinson's secretary to send that on to Wayne Felton which she clearly did but not until after the suspension about which she complains. The timeline is against the claimant and it seems to me, on the information before me today, she would have had no reasonable prospect of succeeding in that claim, even if a fair trial had been possible.

25 I turn then to the claims for unpaid wages and breach of contract. I cannot say that this part of the claimant's claim has no reasonable prospects of success. Given the very fair and open way which Mr Jeffers has considered the documentation before him, it seems possible that the claimant has suffered an underpayment of wages. It is still for her to prove the extent of any underpayment because there is a question about whether she was granted unpaid leave at some point. In any event, the sum which it seems she might have been paid is less than she has received after the default judgment. That matter will need to be determined at the hearing already listed for 8-10 July 2019 unless it is resolved before that.

26 The hearing for one day on **8 July 2019** will proceed unless resolved earlier to determine whether any outstanding wages are due to the claimant. No further case management is necessary as there is a complete bundle of available documents and witness statements.

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Employment Judge Manley

Date: ……10.05.19……..

Sent to the parties on: ....17.05.19.....

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For the Tribunal Office