EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs L Muzongondi	**v**	**Essex County Council**

Heard at: Watford **On**: 11 July 2019

Before: Employment Judge Clarke QC

Appearances

For the Claimant: Mr Oniboken, Solicitor
For the Respondent: Ms J Smeaton, Counsel

JUDGMENT

1. All claims (whether for unlawful deductions from wages, breach of contract, or otherwise) are dismissed upon withdrawal by the claimant.

2. Pursuant to rule 76 of The Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, the claimant is ordered to pay to the respondent a contribution towards its costs in the sum of £1,000.

REASONS

1. At the conclusion of the hearing Counsel for the respondent made an application for costs under rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. In order to explain my decision in that regard, it is necessary to set out something of the procedural history of this claim before turning to the application itself.

2. On 24 September 2018 the claimant commenced these proceedings alleging (so it appeared from the claim form) that an unlawful deduction had been made from her wages. Her case was that from July 2016 to the end of April 2018, she had been doing a second job for the respondent in addition to the job she had originally been employed to do and was not paid in respect of that work.

3. The claim form did not allege that any agreement for additional wages had been made when she was asked to undertake additional duties. What it did make clear was that she had raised the lack of additional remuneration on several occasions and that on each occasion, her request had been refused. Eventually, after she raised a grievance in this regard, the matter was looked at by the respondent again and although it denied any obligation to do so, it paid her £1,000 to reflect the undisputed fact that she had worked extremely hard and effectively when she and others had undertaken limited additional duties.

4. On 11 February 2019 the claimant's present solicitors began to represent her and informed the tribunal of this fact. Simultaneously with serving a notice in that regard they wrote to the tribunal at length stating that the claim was not based on an unlawful deduction from wages (see, for example, paragraph 22 of the letter). It was said that the claim was based on what was described as "unfair prejudice". Reading the letter as a whole, it appeared that what was being alleged was that there had been a breach of contract on the part of the respondent.

5. That this was the claimant's then case was confirmed by a schedule of loss sent to the tribunal on 1 March 2019 in accordance with a case management order. It is headed "damages for breach of contract" and proceeds on that basis. In responding to the claimant's letter (and in in making oral submissions) the respondent correctly noted that the claimant appeared now to accept that this was not an unlawful deductions claim. The respondent also noted that there was no dispute that it had refused to pay any additional wage and no suggestion that a contractual entitlement to such additional remuneration arose. On the contrary, it was suggested (again correctly) that it appeared to be the case that the claimant was alleging that she was entitled to "honorarium" which the respondent had the discretion to award in certain circumstances, but had wrongly not chosen to award to her.

6. In answer to the respondent's correspondence, the claimant's solicitors wrote to the tribunal on 23 April. At paragraph 24 onwards, they asserted on her behalf that the claim was for an unlawful deduction from wages because the sum owed to the claimant was readily quantifiable in accordance with the respondent's policies, which policies it asserted were incorporated into her contract of employment.

7. In written outline submissions sent to the employment tribunal (and the claimant) in advance of (and to be considered at) the one-hour hearing, then listed for the disposal of this case, the respondent set out in detail its contention that however the claim might be put, it had no prospect of success and, in particular, that the tribunal lacked jurisdiction. It was stated that, on the facts as asserted by the claimant, there could be no unlawful deduction from wages claim and that while the respondent asserted that there could be no breach of contract claim, because no term of the contract had been breached, even if there was such a breach, the Employment Tribunal lacked jurisdiction to hear a claim consequent upon it. This was said to be because the claimant's contract of employment was

still extant at the date on which she put in her claim. That was common ground between the parties. The extended jurisdiction (see article 3(c) of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994) only arises in circumstances where the relevant contract of employment has been terminated on or before the date on which proceedings are commenced. The respondent went on to suggest to the tribunal that the I hour closed preliminary hearing be converted to an open preliminary hearing to consider a strike-out application; alternatively, that the case be relisted for three hours in order to enable the strike out application to be dealt with, followed by the remainder of the issues (if any). In the event the case was adjourned to today with a 1 day listing.

8. At the start of the hearing I investigated with the claimant's solicitor exactly how the claim was put. I understood his position to be as follows: -

8.1 He accepted that there could be no unlawful deduction claim in this case as any sum that the claimant said that she was owed had not been agreed and could not be arrived at by application of any formula contained in any of the respondent's policies, because (read at their most favourable to the claimant) those policies gave a discretion to the respondent whether to make additional payments in certain circumstances and a further discretion as to how any such payments might be calculated.

8.2 The claimant's claim was put on the basis that the policies were incorporated into her contract of employment, that this meant that the respondent was bound to exercise a discretion as to whether to give her extra pay (and, if appropriate, a discretion as to its amount), that such discretion (or discretions) was exercised irrationally and that this gave rise to a breach of contract.

8.3 He accepted that the Employment Tribunal would have no jurisdiction to hear that claim based on the present claim form (unamended) as the contract of employment allegedly breached was extant until the end of 2018.

9. Having summarised my understanding of his client's case (see above) I invited the claimant's solicitor to take some time to consider the following: -

9.1 Whether, on reflection, I had correctly understood his case.

9.2 If so, how he wished to proceed.

10. I pointed out that he could apply to amend the claim form, but it would be necessary to consider matters such as whether an amendment should be allowed, given the claim, if presented today, would be presented outside the primary limitation period and whether it would be appropriate to add this claim to a claim form in respect of all current aspects of which the tribunal lacked jurisdiction and whether a further early conciliation certificate would be needed. I pointed out that I had reached no

conclusion on those matters and that there may be further matters upon which the respondent would wish to address me.

11. I also pointed out to the claimant's solicitor that the respondent disputed various aspects of the basic building blocks for a claim for breach of contract, that the claimant might be able to proceed in the County Court in relation to such a claim without similar limitation difficulties, but that should the claimant decide to withdraw the present claim, the respondent might seek an order for costs.

12. After taking instructions for some 45 minutes, the claimant's solicitor withdrew the claim on her behalf. It is, therefore, dismissed on withdrawal.

13. The respondent then made an application for the costs of today, limited to Counsel's brief in the sum of £1,500 (including VAT). It was said that the claimant had known of the difficulties in the way of her claim for many months, as they had been carefully set out in correspondence and that the claimant had addressed them in some detail when responding. She should, it was said, have reached the decision she reached today at a much earlier moment in time, especially as she was legally advised throughout.

14. The claimant's principal point in opposition to this application was that it was not until copies of the relevant policies were received, shortly before today and long after the claim had been begun, that she understood the situation. I do not consider that that is factually correct, furthermore, I consider it irrelevant. The claimant had the policies when she raised the grievance referred to above, which grievance was commenced prior to the commencement of these proceedings as it is referred within them. Contemporaneous documents relating to the grievance make clear that the policies were referred to by the respondent and the claimant directed to where she could find copies. In any event, she had those copies (as the claimant accepts) in advance of the April 2019 letter being written by her solicitors. Hence, insofar as access to those policies was required in order to make an informed decision as to the basis of the claim and whether or not it should be proceeded with, the claimant and her legal advisers had those materials well in advance of writing to assert that the claim was continuing.

15. The respondent says that it amounted to unreasonable conduct of these proceedings to continue with them after the respondent had spelt out the obstacles in the way of them being pursued before the Employment Tribunal, obstacles the claimant now recognises in withdrawing her claim in the above circumstances. Hence, it is alleged that an award of costs ought to be made under rule 76(1)(a). I agree. In the above circumstances I consider it appropriate to make a costs order in the respondent's favour.

16. I asked the claimant for information to enable me to consider her ability to pay; see rule 84. Her take home pay is £1,700 per month. She and her husband own their own home, but it is mortgaged and they have two

dependent children at university. I was told that paying £1,500 would be "difficult". I also bear in mind that the claimant was paid £1,000 in circumstances set out above.

17. Bearing all of the above matters in mind I consider it appropriate to make an order that the claimant pay to the respondent £1,000 towards its costs.

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Employment Judge Clarke QC

Date: …12.07.19……..

Sent to the parties on: .07.08.19.....

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For the Tribunal Office