



EMPLOYMENT TRIBUNALS

Claimant: Miss L Klimaite

Respondent: GfK Retail & Technology UK Limited

Heard at: Reading Magistrates Court **On:** 23 August 2019

Before: Employment Judge Anstis

Representation

Claimant: No attendance or representation

Respondent: Miss L Amartey (counsel)

JUDGMENT (PRELIMINARY HEARING)

1. The claimant's claims for:
 - a. An enhanced severance payment,
 - b. Wages and holiday pay in relation to time spent on an expenses claim, and
 - c. Any other claim for "compensation for time",are struck out on the basis that they have no reasonable prospects of success.
2. The claimant's claim for breach of contract in respect of unpaid expenses is the subject of a separate deposit order.
3. The respondent's application to strike out or for a deposit order in respect of the claimant's claims of unfair dismissal and of less favourable treatment as a part-time worker are dismissed and those claims will proceed to a full hearing.

REASONS

THE CLAIM

- (1) The claimant's claim appears on the face of it to raise the following matters:

- (i) Unfair dismissal,
 - (ii) Less favourable treatment of part-time workers (her dismissal being the less favourable treatment in question),
 - (iii) A failure to pay the correct redundancy payment (it appears that this is in relation to an ex-gratia severance payment rather than a statutory redundancy payment),
 - (iv) Unpaid expenses, and
 - (v) Unpaid wages and holiday pay for the time taken by her to complete her expenses claim (said to be 49 hours, with 5.9 hours holiday pay on top of that).
- (2) She also talks of “compensation for my time” in chasing the respondent for pay slips and in preparing her case for the employment tribunal. I do not see that this can be considered within the jurisdiction of the employment tribunal. It is not a claim that the employment tribunal can consider except to the extent that she may later apply for a preparation time order (if the circumstances warrant it)
- (3) In submitting its response, the respondent also made an application to strike out or alternatively for a deposit order (of £1,000 per claim) on the basis that they had no reasonable prospect of success or, alternatively, little reasonable prospect of success.

THE PURPOSE OF THE HEARING

- (4) On 1 February 2019 Employment Judge Vowles directed that there should be an open preliminary hearing to consider:
- (i) What claims are being pursued,
 - (ii) Whether any claims have no reasonable prospect of success and should be struck out,
 - (iii) Whether any claims have little reasonable prospect of success and should be made the subject of a deposit order up to £1,000, and
 - (iv) What case management orders are required for the future conduct of the proceedings.
- (5) Those are therefore the matters that I am to consider at this hearing.

APPLICATIONS TO TRANSFER

- (6) From 10 June 2019 onwards, the claimant made a number of applications to have this hearing transferred to the London South employment tribunal in Croydon. This was initially on the basis that she would be better able to obtain representation if the hearing was in Croydon, and also that it would avoid the cost of an overnight stay in Reading, which she said would be necessary if the hearing was in Reading.
- (7) This application was opposed by the respondent, essentially on the basis that the claimant’s application has been made very late (the notification of the hearing having been sent on 1 February 2019), it was not difficult to travel from London to Reading, there would be no need for an overnight

stay and a transfer to Croydon would unnecessarily delay the hearing.

- (8) On 24 July 2019 the claimant added to her application that there was a better chance of getting a FRU rep to represent her at a hearing in London, that it remained costly and took a long time to travel from her home in south London to Reading.
- (9) The respondent replied that while it considered that the preliminary hearing should, in order to avoid delay, be held in Reading, it had no objection to any full hearing of the case being held in Croydon.
- (10) On 4 August 2019 the Regional Employment Judge rejected the application for a transfer, essentially on the basis of the delay that would be caused by a transfer, but said that the venue for the final hearing of the case would be decided at this hearing.
- (11) Following further representations from the claimant the Regional Employment Judge maintained his decision but put back the start time for the hearing to 11:00 in order to accommodate any travel difficulties the claimant may have.
- (12) On 16 August 2019 the claimant submitted a further application to transfer the hearing, including in support of her application a 'fit note' from her doctor.
- (13) Bearing in mind the terms of the Presidential Guidance of 4 December 2013 I refused this further application for a transfer on the basis that the note said nothing about the claimant's ability or inability to travel or attend a hearing in Reading.

THE HEARING AND MY DECISION

- (14) The claimant did not attend and was not represented at this hearing.
- (15) I heard the application by the respondent to strike out (or for a deposit order) in respect of the claims identified above.
- (16) In doing so I bore in mind the frequent reminders from the appeal courts that strike out on the basis that there is no reasonable prospect of success is a high hurdle to meet. Most recently in Malik v Birmingham City Council (UKEAT/0027/19), Choudhury P drew on the following points from Mechkarov v Citibank NA [2016] ICR 1121:
 - (1) *only in the clearest case should a discrimination claim be struck out,*
 - (2) *where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence,*
 - (3) *the claimant's case must ordinarily be taken at its highest, and*
 - (4) *if the claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous*

documents, it may be struck out.”

- (17) While the focus of that and other authorities is on discrimination claims, the points appear to me to be equally applicable to any other fact-sensitive claim in the employment tribunal.
- (18) In respect of the unfair dismissal claim, while Miss Amartey was able to point to a number of respects in which the claimant's account of events did not match what was recorded in contemporaneous documents, this was some distance from being 'totally and inexplicably inconsistent' with 'undisputed contemporaneous documents. The fact that there may be weaknesses in parts of the claimant's arguments on unfair dismissal is a long way from me being able to say that there is no or little reasonable prospect of success.
- (19) In relation to the part-time worker's claim, Miss Amartey argued both that the claimant's line manager was not a proper comparator and that he had been dismissed with his dismissal to take effect at the same time as the claimants. Those may be arguments which find favour with the tribunal which conducts a full hearing of this case, but I cannot say that they are bound to mean that the claimant's claim fails or has little reasonable prospect of success. In particular, if I take the claimant's claim at its highest (by taking everything in her claim form as being true) she says that her manager retained his job. While I have seen a document in which he is given notice, this does not mean that that notice was not subsequently revoked or that he was not given another job.
- (20) For those reasons I declined to make any order to strike out or for a deposit in respect of the unfair dismissal and part-time worker's claims.
- (21) In respect of the claimant's claim for severance pay, and for the hours that she had spent on completing her expenses claim and holiday pay relating to that, I did find that those should be struck out. The difficulty for the claimant is that even if what she says in her claim form is correct, I do not see what the basis for any such claim would be. The work on her expenses took place after her employment had ended. I do not see that there can be any question of unlawful deduction from wages or breach of contract in such a case, nor any claim for a minimum wage. This was at most work for her benefit, not her employer's. The claim for a severance payment is not a claim for a statutory redundancy payment, but appears to be in respect of an ex gratia severance payment. The claimant has not identified any basis in her claim (whether contractual or otherwise) on which she would be entitled to that. The same analysis applies to the "compensation for my time" element, if this was intended as an additional and separate part of her claim. (This is, of course, without prejudice to any later application for a preparation time order that the claimant may make if the circumstances warrant it.)
- (22) As regards the claim for expenses, Ms Amartey was able to point me to a number of points in the respondent's materials at which it was said that expenses needed to be claimed as soon as possible and in any event within three months. Those strongly suggest that the claimant had no

contractual entitlement to claim expenses beyond a three month period, but I cannot be sure exactly how the claimant is putting her claim on this, or indeed what period the claimed expenses relate to. It appears to me that these are claims which have little, but not no, reasonable prospects of success, and that as such it is appropriate to make a deposit order. This will be the subject of a separate order. I did not have the claimant present in order to ask about her means, but I note from the tribunal correspondence her apparent difficulties with the cost of travel to Reading, which suggest that she does not have a lot of money to meet any deposit order. In such circumstances £100 seems to be a reasonable amount to order.

- (23) Following this I made further case management directions which are the subject of a separate order.

Employment Judge Anstis

Date: 23 August 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE