EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Gledhill	v	**Generis (UK) Ltd t/a Mylan**

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: **Watford** **On: 6 December 2019**

Before: Employment Judge Alliott

Appearances:

For the Claimant: **In person**
For the Respondents: **Ms D Sengupta QC, Counsel**

REASONS

1. This open preliminary hearing was ordered by Employment Judge Wyeth on 14 November 2018 to determine the following issues:

> "2.1 Whether any or all of the complaints should be struck out under Rule 37 of the Employment Tribunal's Rules of Procedure 2013; and/or
>
> 2.2 Whether a deposit or deposits should be ordered to be paid by the claimant in accordance with Rule 39 of the 2013 Rules on the basis that all or any of the complaints have little reasonable prospect of success;
>
> 2.3 Any further case management matters which then arise, if any."

2. The claimant was employed between 2 November 2015 and 9 February 2018 as a paralegal. By a claim form presented on 17 May 2018, following a period of early conciliation from 26 February to 23 March 2018, she presented claims of unfair dismissal, sex discrimination, detriment for making a protected disclosure, automatically unfair dismissal for making a protected disclosure, breach of contract and holiday pay.

3. Consequent upon the first preliminary hearing in this matter the claimant has withdrawn her indirect sex discrimination claim and that has been dismissed. At

today's hearing the claimant indicated to me that the holiday pay claim was withdrawn and consequently that stands to be dismissed upon withdrawal.

4. As such, the claims that remain live before me are as follows:

   4.1 Direct sex discrimination, contrary to s.13 of the Equality Act 2010;

   4.2 Detriment for making a protected disclosure, contrary to s.47(b) of the Employment Rights Act 1996;

   4.3 Automatically unfair dismissal for making a protected disclosure, contrary to s.103(a) of the Employment Rights Act;

   4.4 Unfair dismissal contrary to s.98 of the Employment Rights Act 1996;

   4.5 Breach of contract.

5. **The evidence**

   5.1 Employment Judge Wyeth directed that this preliminary hearing would be determined on submissions and without evidence.

   5.2 I have been provided with a skeleton argument from the respondent which runs to 16 pages and a skeleton argument from the claimant which runs to 19 pages. I have been provided with a chronology and a 209 page bundle. I have been provided with a bundle of 14 authorities and I record here that the only one that I have specifically read is the Chesterton Global Ltd case.

6. **The law**

   6.1 My powers to make a Strike Out Order or a Deposit Order are contained in Rules 37 and 39 of the ET's (Constitution and Rules of Procedure Regulations 2013). I do not recite them here but have taken them into account.

   6.2 In their skeleton arguments both the claimant and the respondent have made representations on the law. In summarising the law as I see it I will be relying upon the submissions of the respondent but this is not to say that I have just simply accepted what the respondent has to say to me and ignored what the claimant has to say.

   6.3 As regards Strike Out it has been submitted that:

> "No reasonable prospect of success presents a lower threshold than no prospects of success; it is not an issue of deciding whether a case is hopeless but rather the question is whether an argument has a realistic as opposed to a merely fanciful prospect of success: Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting 2002 ICR 646 at 46."

   6.4 A claim should not be struck out on the basis that it has no reasonable prospects of success where the central facts are in dispute, unless exceptional circumstances exist, such as where the contemporaneous

documentation is inconsistent with the facts asserted by one party: EZSIAS v North Glamorgan NHS Trust 2007 ICR 1126 at 25-26.

6.5 In particular I acknowledge that the Employment Appeal Tribunal has repeatedly said that in relation to discrimination cases a claimant is entitled to have the factual dispute heard by a full tribunal in order to determine the matters in dispute and that it will only be in exceptional cases where a Striking Out Order is appropriate in relation to a discrimination claim. I record that I have adopted the same approach as regard the protected disclosure allegations.

7. **Protected disclosure**

7.1 The respondent's application in relation to the protected disclosure claims is solely concentrating on the issue as to whether or not the claimant has a reasonable prospect of establishing that she made a protected disclosure within the meaning of the Employment Rights Act. Issues relating to the alleged detriment and causal link with the dismissal have not been dealt with. However, if and insofar as the claimant has no reasonable prospect of establishing that she made a protected disclosure then it must be that those claims fail.

7.2 S.43(b) of the Employment Rights Act 1996 defines disclosures qualifying for protection and I have taken it into account but do not repeat it here.

7.3 In the context of disclosure of information, the respondent has cited to me extracts from Kilraine v London Borough of Wandsworth [2018] ICR 1850. Again, I record that I have taken those into account but I do not repeat them here due to time issues.

7.4 In my judgment, in relation to the particular circumstances of this case, when dealing with breach of legal obligation I have concentrated on the issue of whether or not the legal obligation concerned can be a breach of an employment contract. The IDS Employment Law Handbook "Whistle Blowing at Work 2013" deals with this issue at s.3.46. The case of Parkins v Sodexho Ltd [2002] IRLR 109 EAT is cited in support of the proposition that the legal obligation can encompass an employee's contract of employment. However, the IDS Handbook goes on to debate the issue in light of the change to the legislation which introduced the public interest aspect to s.43(b) ERA.

7.5 The whole issue was considered in the case of Chesterton Global Ltd & another v Nurmohaned & another [2017] EWCA Civ 979. That case sets out the legislative route to the introduction of the public interest element and states that the intention of Parliament was to reverse the decision in Parkins v Sodexho. As per Lord Justice Underhill in paragraph 37:

> "Against that background, in my view the correct approach is as follows; in a whistle blower case where the disclosure relates to a breach of the worker's own contract of employment… there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker… The question is one to be answered by the tribunal on a consideration of

all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at paragraph 34 above may be a useful tool."

7.6 Paragraph 34 of the judgment is summarised in the headnote to that case and sets out the following four points that would normally be relevant when determining whether a disclosure is in the public interest or not:

"(a) the numbers in the group whose interests the disclosures served;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
(c) the nature of the wrongdoing disclosed;
(d) the identity of the alleged wrongdoer."

7.7 For the purposes of this application to Strike Out and/or make a Deposit Order I have to take the claimant's case at its highest.

8. **Breach of contract**

8.1 Obviously enough the claimant was working pursuant to a written contract of employment.

8.2 The nature of the complaints made by the claimant, as I understand them, are that various representations were made to her as to variations of her contract. In particular, she has contended that she was told she would be paid overtime and/or a one off discretionary bonus in relation to work on one project and had assurances that she would be promoted and would have a salary increase.

8.3 As far as contractual law is concerned the claimant will have to establish at trial that agreement was reached on variations to her contract and that that agreement was sufficiently certain such as to be contractually binding.

9. **The facts**

<u>The unfair dismissal/sex discrimination claims</u>

9.1 The reason given by the respondent for the dismissal of the claimant was redundancy. The claimant challenges that there was a genuine redundancy situation. The claimant advances a claim that there was a sham redundancy and that the respondent used it as an excuse to terminate her contract of employment. She characterises this both as unfair and also less favourable treatment on the grounds of her sex. I have probably grossly over-simplified the nature of her claims but nevertheless, I have concluded that the issues between the parties are fact specific and consequently it would be inappropriate for me to strike out those claims and/or order a deposit order. Consequently, I do not.

<u>The protected disclosures</u>

9.2 The protected disclosures alleged in the agreed list of issues are as follows:

"3. The claimant claims that she made the following alleged protected disclosures:

(a) In September 2017, the claimant spoke with Krista Leino about inter-alia how she felt her concerns to date were serious and that they had not been addressed by the respondent, and

(b) On 17 January 2018, the claimant spoke with Kevin Macikowski about her role, a review of her job description and a bonus. The claimant advised Mr Macikowski that she considered that these matters were breaches and that the situation was becoming untenable".

9.3 Since the alleged disclosures referred to "concerns", during the course of this hearing I sought confirmation from the claimant as to what those concerns were. By drawing on a previous iteration of the agreed list of issues, it would appear that those concerns related to various conversations the claimant had had with various people in management above her and in HR. The particular matters raised are in section 3a-f of page 81 of the bundle. I do not recite them here. They relate to issues concerning overtime/bonus/the claimant's role/the claimant's job title/the identity of the claimant's line manager and her work load. In my judgment, the way those matters are set out very much relate to the claimant discussing those issues with her line manager's and HR in the context that she was seeking improvements in her working conditions and pay.

9.4 For the sake of thoroughness, I address how those issues were pleaded in the claimant's claim. At paragraph 70, it is stated:

> "During my conversation with Krista, I shared the history of my situation, having felt that none of my concerns were being addressed or resolved, and wanting some guidance about getting my situation sorted as soon as possible. Krista said that she understood my confusion and suggested that I speak with Tom in order to gain clarity (regarding the e-mails), which I did immediately thereafter".

9.5 And as regards the second alleged disclosure:

> "93. On Wednesday January 17th 2018 I had a "catch up" call with Kevin, whereby we discussed work. I voiced my concern about the unresolved issues about my role, about a job description review, and the bonus. I did not mention the new hire in this conversation. I did, however, state that the situation was becoming untenable due to the sustained breaches of obligation and duty, and that no one should be left with the issues that I had raised with him for this long without resolution".

9.6 In considering the prospects of success of the claimant's claim, as regards the making of a protected disclosure, I have considered what information it is alleged was disclosed, whether it is likely to be able to be shown that it was in the public interest and what legal obligation it is alleged that information tended to show was likely to be not complied with. In my judgment, the claimant would stand very significant difficulties in establishing each of those necessary constituent parts in order to establish that she had made a protected disclosure.

9.7 Firstly, the way the case has been presented indicates that the claimant was not disclosing information, but was raising issues that related to her employment. She wished to be paid overtime, she wished to be paid a bonus, she wanted a more senior role and job title etc. She told me that her

line manager had said that she would be paid overtime. When I questioned her as to the nature of the information that she says she was imparting, she told me that she was not getting a response to promises about overtime, bonus etc. She told me was not getting an explanation of what was going on and she was not being given any guidance. In my judgment, taking her case at its highest, the claimant stands no reasonable prospectsof success in establishing that she disclosed information.

9.8 I now consider what legal obligation it is that the claimant relies upon. All the pleaded case, in my judgment, relates to breaches of the claimant's contract of employment insofar as she has made averals that there were variations made to it. As will appear in due course in the section dealing with breach of contract, I have concluded that the claimant stands no reasonable prospects of establishing some of her allegations of breach of contract and little reasonable prospect of establishing breach of contract in relation to the overtime and/or bonus issues. In my judgment, this case has always been about a breach of a legal obligation being the claimant's contract of employment. It is fair to say that before me today, the claimant sought to widen the ambit of her alleged breach of legal obligation to include compliance with the Equality Act and not discriminating against her. However, I consider that is not the way the case has been developed hitherto.

9.9 Consequently, the legal obligation in this case relates to the claimant's own contract of employment. In those circumstances, according to Chesterton, I need to look as to whether or not it is capable of being a disclosure in the public interest. In my judgment, the number of the group whose interests the disclosure served are restricted to the claimant herself. Obviously, the identity of the alleged wrong-doer is her line manager and/or the respondent. The nature of the interests affected and the alleged wrong-doing disclosed relates to the relatively narrow issue of the extent to which the claimant's contract of employment may have been varied in her own particular circumstances.

9.10 Consequently, as regards the legal obligation and whether the disclosure will be shown to have been made in the public interest, I have concluded that the claimant has no reasonable prospect of establishing that. I have concluded that in the context obviously, that the belief does not have to be the sole reason for the disclosure, does not have to be correct in law and merely has to be reasonably held by the claimant at the material time. Nevertheless, I have come to that conclusion.

Breaches of contract

9.11 Between August 2016 and June 2017, the claimant was working on the Meda project. In that context she says that she did considerable work over and above that required pursuant to her contract of employment. Her contract of employment contains a clause requiring her to work as and when may be required in excess of her normal working hours.

9.12 Be that as it may, the claimant told me that her line manager told her that she would be paid overtime. Apparently, the contracts of employment of employees in America provide for the payment of overtime. The claimant told me that her line manager did not understand the nature of her English contract of employment. Whilst the claimant may have a record of what hours overtime she worked, she was unable to tell me what rate she would be paid for that overtime. She was not given a rate. She thought it would have to be based on her salary.

9.13 The claimant told me that once her US line manager had told her that she would be paid overtime, she went to HR to sort it out. Someone called Lorraine at HR told her that under her contract of employment she was not entitled to overtime. She was told that there was the prospect of a one-off discretionary bonus for specific work on a project.

9.14 The claimant did have a contractual right to an annual discretionary bonus and was paid one in March 2017 and March 2018.

9.15 Thus, it appears to me that the claimant's contract of employment did not contain provisions for the payment of overtime. Whilst I make no findings of fact on this issue, taking the claimant's case at the highest, she says she was told by her US line manager that she would be paid overtime. In my judgment she stands considerable difficulties in establishing that that constituted an agreed variation to her contract of employment but I do not find that it stands no prospects of success. The difficulties in the claimant's path are whether it was sufficiently certain to constitute an agreed variation to her contract of employment. On the other hand, the law is well used with assessing quantum meruit claims. Accordingly, there will be a deposit order in relation to this aspect of the claimant's claim.

9.16 As regards the claimant's salary, promotion and job title are concerned, the claimant explained her case as being that there was an understanding that she would be promoted and given a raise. That she was told that management would come back to her in a couple of weeks and did not. That she was told to be patient and that there were various conversations where she was told that she was going to get promotion.

9.17 In my judgment, taking the claimant's case at its highest, these are no more than preliminary negotiations with no concluded agreement as to whether the claimant would be promoted, when and at what salary level. In my judgment, whatever was discussed, on the claimant's case at its highest, it was insufficiently certain to constitute a concluded agreement. Accordingly, in my judgment those claims for breach of contract stand no reasonable prospect of success and will be struck out.

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Employment Judge Alliott

Date: 27 February 20

Sent to the parties on:

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For the Tribunal:

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