Case No: 1602232/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms D Tucker

Respondent: Safer Wales Limited

JUDGMENT

The Claimant's application, that the Respondent be ordered to pay a deposit as a condition of continuing to defend the procedural fairness of the Claimant's dismissal, is refused.

REASONS

Background

1. This case, involving a claim of unfair dismissal by the Claimant, was due to be considered at a final hearing on 21 and 22 April 2020. However, in view of the Presidential Direction issued in respect of hearings during the Covid-19 pandemic, that hearing was postponed and converted to a case management hearing to be undertaken by telephone on 21 April 2020. In advance of that, the Claimant submitted an application that the Respondent should be ordered to pay a deposit as a condition of defending the procedural fairness of its dismissal of the Claimant. A notice of hearing was then issued to the parties, on 15 April 2020, noting that that application would be considered at the telephone hearing scheduled for 21 April 2020.

2. Due to concerns raised by the Respondent about its lack of preparedness for the deposit order application to be considered on 21 April 2020, I did not consider the application on that day, but gave directions to the parties to provide; in the case of the Claimant, an addendum to her submissions in support of her application by 22 April 2020; and, in the case of the Respondent, its complete substantive submissions on the application by 28 April 2020. The deposit order application was then to be considered on the papers as soon as was reasonably practicable.

3. The parties provided the relevant written submissions to enable me to consider the application.

Issues and law

3. Rule 39 of the Employment Tribunals Rules of Procedure provides that where a tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

4. In terms of the test to be applied in the assessment of whether a specific allegation or argument has little reasonable prospects of success, guidance has been provided in various decisions of the Employment Appeal Tribunal. It has been made clear that the test is plainly not as rigorous as the test of "no reasonable prospects" required in respect of a strike out application under Rule 39, and that a tribunal has greater leeway when considering whether to order a deposit. However, as was made clear in the case of Van Rensburg v The Royal Borough of Kingston upon Thames (UKEAT/096/07), the tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

5. In Hemdan v Ishmail [2017] ICR 486, Simler P noted that, "a mini-trial of the facts is to be avoided", and that, "if there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested". HHJ Eady QC also made clear, in the case of Wright v Nipponkoa Insurance (Europe) Ltd (UKEAT/0113/14), that it is important that the tribunal engages with, and understands the basis of, the claim or response before concluding that it has little reasonable prospects.

The application and response

6. The Claimant submissions in support of the deposit order application were summarised as follows:

"*a. R relied on a cleaner's evidence without any challenge.*
b. R relied on an expert's preliminary report which was flawed in that similarities had been identified with handwriting that was not C's.
c. R preferred its own expert without providing any reasonable basis for its preference.
d. R relied on what it believed to be C's involvement in a previous incident when the procedures used in disciplining her were flawed and unreasonable.
e. R gave witnesses with anonymity and it redacted statements without good reason.
f. R did not investigate C's concerns. These included, the cleaner's evidence, its expert's qualifications, her belief that she was being set up and whether she was alone on the day in question.
g. R did not provide C with the witness statement of MG.
h. R did not provide C with the laboratory pictures from its expert that showed that similarities in handwriting had been found in samples of handwriting that was not C's.
i. There was not proper separation of roles between the dismissal hearing

and
the appeal."

7. The submissions as a whole had provided more detail on those contentions, and the Claimant submitted that the Respondent's dismissal of her had been procedurally unfair and that it had little reasonable prospect of persuading the Employment Tribunal ultimately considering this case that it had followed a fair procedure.

8. The Respondent, in addition to contending that the application had been made late in the day and opportunistically in light of the postponement of the final hearing, neither of which I considered to be material, contended in response that in deciding the outcome of the application the Tribunal would be making a decision on the core issues without full evidence and witness statements. It would therefore be conducting a 'mini-trial' which had been criticised as inappropriate in Hemdan. It then sought to explain where there were areas of factual conflict.

Conclusions

9. I was conscious that, when this claim is to be considered at a full merits hearing, as a dismissal on the grounds of conduct will be considered, the three-stage test expounded by the EAT in the seminal case of British Homes Stores Ltd v Burchell [1978] ICR 303 will need to be considered. That will involve consideration of; whether the Respondent had a genuine belief in the Claimant's guilt in committing the disciplinary offence, whether that belief was based on reasonable grounds, and whether those grounds were formed from a sufficient investigation. The Tribunal will also need to consider whether the investigation carried out by the Respondent was one which fell within the range of responses open to an employer acting reasonably in the circumstances, and also whether the imposition of the sanction of dismissal was within the range of responses open to an employer acting reasonably in the circumstances.

10. Whilst I can see that the areas of concern outlined by the Claimant in her submissions in support of her application are areas which will be relevant when the fairness of the dismissal is considered at the final hearing, and if resolved in the Claimant's favour, will be likely to lead to a conclusion that her dismissal was procedurally unfair, I was not satisfied that it would be appropriate for me to conclude that the Respondent's defence in relation to these matters had little reasonable prospect of success.

11. I considered, applying the guidance of Simler P in Hemdan, that there were core factual conflicts which should properly be resolved at the final merits hearing where the evidence could be heard and tested. I was conscious that, in relation to the matters which are to be assessed at the final hearing, consideration will need to be given by that Tribunal to a range of matters in relation to which the reasonableness of the Respondent's approach will need to be assessed, and, in a number of areas, the question of whether Respondent's actions fell within the relevant range of reasonable responses will need to be considered. In my view, it was not therefore appropriate for me to form a conclusion on the prospects of the Respondent successfully defending the procedural fairness of its dismissal of the Claimant at this preliminary stage.

Employment Judge S Jenkins

Date: 26 May 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
6 July 2020
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FOR THE TRIBUNAL OFFICE