



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE C HYDE (sitting alone)

**BETWEEN:**

Claimant

MRS C BLACK

AND

Respondent

AVIOS GROUP (AGL) LIMITED

**ON:** 24 September 2019

**APPEARANCES:**

For the Claimant: Ms Niaz-Dickinson, Counsel

For the Respondent: Ms G Hirsch, Counsel

**JUDGMENT** having been sent to the parties on 11 December 2019, and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. These reasons are provided at the request of the Claimant in respect of the Tribunal's decision that the Claimant was entitled to pursue her unfair dismissal complaint, following an open preliminary hearing on 24 September 2019. Confirmation of the Judgment and case management

- Orders made was sent to the parties in two separate documents on 11 December 2019. The Claimant wrote to request reasons for the Tribunal's judgment by email sent on 23 December 2019. She gave no other reason for the request other than that she was a litigant in person and would very much appreciate them.
2. These reasons are set out only to the extent that the Tribunal needed to in order to explain its decision, and only to the extent that was proportionate.
  3. In a claim form presented on 20 December 2018, the Claimant made it clear that she was bringing a claim of unfair dismissal under the Employment Rights Act 1996. Grounds of resistance were presented on 5 February 2019. The Respondent made a point about whether the Tribunal had jurisdiction to determine the Claimant's claim by reason of the fact that the Claimant had signed a settlement agreement.
  4. At the direction of Employment Judge Sage, the Tribunal wrote to the parties on 27 March 2019 notifying them that the full hearing which had been listed for 24 September 2019 would be a preliminary hearing to decide if the Tribunal has jurisdiction to hear the case in light of the settlement agreement.
  5. In addition to addressing the Tribunal about the issue which the parties had been given notice of in relation to the settlement agreement, Ms Hirsch submitted that the Tribunal should rule that the Claimant was not entitled to proceed with her unfair dismissal complaint on the additional ground that it was an abuse of process in the light of the Claimant's stated intention in the preamble to her details of claim as to what she hoped to achieve from the Tribunal procedure.
  6. Ms Niaz-Dickinson indicated that she had not been warned that this issue would arise and that she did not consider it was appropriate for the Tribunal to make a determination on this. Ms Hirsch argued that it was a simple and obvious point which the Claimant ought to be able to address.
  7. I took into account that the reason for the preliminary hearing had been notified to the parties nearly six months previously and the first indication that this abuse of process argument would be brought forward was, as far as the Tribunal was aware, during the hearing.
  8. Without commenting on the validity of the Respondent's argument, I accepted the Claimant's submission that it was not appropriate for it to be dealt with today because that would not be fair and would not give the Claimant adequate opportunity to consider the position and address it accordingly. I therefore declined to entertain that argument at this hearing.

9. I was assisted by an agreed bundle of documents which I marked [R1] and which had just short of 100 pages, and by a skeleton argument which I marked [C2] prepared by Counsel for the Claimant and also by print-outs of the transcripts of relevant authorities. On behalf of the Claimant reference was made to the case of ***Hilton UK Hotels Limited v Mrs Cecilia McNaughton*** [2005] WL 3299131, an Employment Appeal Tribunal (“EAT”) case and the case of ***McWilliam v Glasgow City Council***, a Scottish EAT case [2011] WL 1150990. Ms Niaz-Dickinson also referred to the case of ***University of East London v Hinton*** [2005] ICR 1260, a Court of Appeal Judgment.
10. Both parties cited the case of ***Lunt v Merseyside TEC Ltd*** [1999] IRLR 458 and the Respondent also cited the ***Hinton*** case.
11. In the event, there was no dispute between the representatives as to the state of the law.
12. The main question was really about the effect of the statutory provisions in section 203 of the Employment Rights Act on the Claimant’s ability to bring this claim of unfair dismissal.
13. The parties were agreed that there was currently no authority on similar facts to this. In outline, the relevant facts were that the Claimant had been working for the Respondent in a senior financial position for some nine years or so. A re-organisation was either underway or in anticipation but it was clear that there was the possibility of redundancy.
14. Discussions between the parties led to the Claimant signing a settlement agreement in July 2018 and the Claimant agreed that her employment would terminate at the end of September 2018 with the last month to be taken as garden leave. That meant, therefore, that for a period of approximately six weeks she remained at work before going on garden leave.
15. The Respondent then, based on reports of the Claimant’s alleged actions, which were said to have taken place towards the end of August and the beginning of September 2018, conducted an investigation into her conduct and then called the Claimant to a disciplinary process which led to the termination of her employment by reason of gross misconduct on 28 September 2018.
16. That background, as I have said, was agreed. The question was whether the Claimant was precluded from complaining about unfair dismissal in this Tribunal.
17. Both Counsel were of assistance to the Tribunal in their oral submissions. Counsel for the Claimant had presented a very

- comprehensive written analysis of the applicable law which Ms Hirsch endorsed. The only disagreement between Counsel was about the application of the law to the circumstances of the case. In those circumstances I did not consider it proportionate to repeat the applicable law in these reasons.
18. It seemed to me that the most relevant consideration here and the one which weighed most heavily was that it did not appear that it was appropriate to prevent the Claimant from pursuing her complaint against a background of a statutory scheme which renders void the ability of an employee to contract out of the right to bring an unfair dismissal claim unless the statutory safeguards were complied with.
  19. It did not appear to me that it was the intention that those safeguards should be deemed to apply to facts which had not yet taken place, at the time that the settlement was concluded. The alleged misconduct was not something which was suspected nor did either party have it in their contemplation at that point. I further had in mind that the relevant party's contemplation, of course, is the employee's. They are the ones for whom the safeguards are in place. There was nothing in the background of discussion about settling a potential redundancy unfair dismissal case to suggest that a gross misconduct dismissal would follow because of breach of confidential information duties.
  20. That in essence is what I considered to be the most compelling part of the background of this case and which I thought was consistent with the provisions in section 203B and C of the Employment Rights Act 1996 in particular.
  21. I ruled that the Claimant was entitled to bring a complaint of unfair dismissal.

Employment Judge Hyde

Dated: 3 April 2020