EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Renford	**v**	Mitie Limited

Heard at: Norwich (by CVP) **On:** 28 July 2019

Before: Employment Judge M Warren

Appearances
For the Claimant: In person.
For the Respondent: Mr S Way (Counsel).

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Claimant's claims for Unfair dismissal and breach of contract, (including sick pay) are dismissed for want of jurisdiction.

2. The Claimant's claim for unpaid wages is not struck out, but will be the subject of a Deposit Order, details of which will appear separately.

REASONS

Background

1. Mr Renford was employed by Mitie Limited as a security officer. His employment started on 6 February 2013. He was employed on a zero hours contract. He brought a claim on 2 November 2019, after a period of conciliation between 21 and 24 October 2019.

2. Today's open preliminary hearing was to decide whether any of the claims should be struck out or whether a deposit order should be made.

3. In terms of documents I have had before me today, I had in advance of the hearing a bundle prepared by those advising the respondent, for which I am grateful. I also a skeleton argument from Mr Way, accompanied by some authorities.

4. This hearing has been converted to a CVP, (that is, a video) hearing late in the day. Mr Renford explained to me that he received notice of that yesterday at 4.20pm. He put an electronic bundle of the papers he wanted to refer to together and emailed that to the Tribunal at 10.03pm last night. I am grateful to Mr Renford for the considerable effort I am sure he made in getting that done. However, the staff have not passed it on to me.

5. I am told by the respondent that they invited Mr Renford to co-operate with them in the preparation of a single agreed bundle and he declined to do so, saying that he wanted to prepare his own. That is a shame, he ought to have cooperated. Be that as it may, Mr Renford's bundle was 641 pages long, which is clearly a disproportionate size for an open preliminary hearing like this. It was to be accessed via a link to Google Drive. I know from previous experience where parties have tried to send us bundles this way, that from the Tribunal's perspective, technically that just will not work. So, I have pushed on today, even though I do not have Mr Renford's documents. That is a significant factor which weighs in my mind when I reach my Judgment.

The Law

Dismissal

6. If a tribunal does not have jurisdiction to consider a claim, the claim should be dismissed.

Strike Out

7. Employment Tribunals Rules of Procedure, rule 37 provides that:

> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;…*

8. A tribunal should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospects of success, see Mbuisa v cygnet Healthcare Ltd UKEAT 0119/18. Strike out is a draconian step that should only be taken in exceptional cases.

Deposit Order

9. The Employment Tribunals' rules of procedure at Rule 39 provide as follows:

> *(1) Where at a preliminary hearing (under rule 53) the 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*
> *(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
> *(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.*
> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*
> *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
> *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.*
> *(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

10. There is recent guidance from the then present President of the EAT, Mrs Justice Simler, in the case of Hemdan v Ishmail and another UKEAT/0021/16. Mrs Justice Simler reviewed the legal principles to be applied when considering whether or not to make a Deposit Order. She said at paragraph 10,

> *"There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."*

At paragraph 12,

> *"The test for ordering payment of the deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasis the fact that there must be such a proper basis."*

She says at paragraph 13,

> *"The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. …a mini-trial of the facts is to be avoided…"*
> *"Where there is a core factual conflict it should be properly resolved at a full Merits Hearing where evidence is heard and tested."*

Lastly, at paragraph 15,

> *"Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors."*

Unfair dismissal and breach of contract claims

11. I will tackle now first of all, the claims that have been made for unfair dismissal and breach of contract. The fact of the matter is that at the time Mr Renford issued this claim, he had not been dismissed by the respondent. He was still in their employment. He was suspended with a disciplinary hearing outcome pending. I was told this morning by Mr Way that recently, an outcome to the disciplinary hearing was provided, which was a final written warning.

12. Although Mr Renford has said to me today that he has been constructively dismissed, it is clear from my discussions with him that he has not resigned his employment. There has been no communication either way to terminate the contract of employment. He has not been dismissed. His employment continues. He cannot therefore claim unfair dismissal.

13. A breach of contract claim only arises on termination of a contract of employment, (see Article 3 c of the Employment Tribunals Extension of Jurisdiction (England and Wales Order 1994). There has been no such termination and therefore, the breach of contract claim cannot proceed either.

14. For these reasons, the unfair dismissal and breach of contact claims are struck out.

Sick Pay claim

15. The claim for contractual sick pay is founded on the contract, it is a breach of contract claim so that too cannot proceed.

Holiday Pay claim

16. Mr Renford has made reference to a claim for holiday pay. There is no claim in the claim form for holiday pay and therefore no such claim before the tribunal.

Wages claim

17. Mr Renford's employment began in February 2013. His title at the time was Support Officer. It was a zero hours contract. He was paid £7 per hour. He referred me to a letter of 19 April 2013 in which he was given a new job title of Relief Support Officer and put on the Relief Support Officer rate of £7.50 per hour. From that point onwards for a couple of years, he moved about a good deal, working as a security officer in a number of locations. In those various locations, he was paid a minimum of £7.50 but if the rate of pay for security officers at a particular site he was working on was higher than £7.50 per hour, he received the higher rate.

18. He has worked continuously at the site of TNT in Thetford since December 2015 through to August 2019. There he was paid £7.50 per hour until such time as the National Minimum Wage as increased annually, exceeded that sum. After that point, he was always paid the National Minimum Wage hourly rate.

19. He told me today that his argument is that he should be on the higher hourly rate of £9.75 because other Relief Support Officers were on that rate. He protests that it cannot be that he is paid less than others. Of course, it can be, if that is what his contract says. He was not able to refer me to any document which states that he was entitled to the same rate of pay as other Relief Support Officers and for that reason, I have serious doubts about the merits of his wages claim.

20. That said, I am concerned firstly, about Mr Renford's lack of understanding and secondly, I am concerned about the fact that I do not have sight of the documents that I might like to see and that Mr Renford might like to refer me to, in order to try and prove that his contractual rate is £9.75.

21. So, it seems to me in these particular circumstances, (awkward though they are because this is a video hearing arranged at the last minute, rather than an attended hearing, because of the Coronavirus crisis) I would not be doing justice if I struck out Mr Renford's Wages claim now. I do though have misgivings for the reasons that I have explained and I am therefore inclined to make a deposit order.

22. Mr Renford told me that his financial circumstances are that he currently has work as a security officer paid at £9.72 per hour for a 36 hour week. He tells me he has no savings and he has debts of £15,000. I must make sure that any deposit order I make is not in a sum which renders the paying of a deposit a barrier to Mr Renford proceeding with the claim if he chooses to do so. If have therefore decided to set the deposit at £20.

23. I have explained to Mr Renford that I have ordered him to pay a deposit of £20 which hopefully will not prevent him from going on with his case if wishes to do so, but it is a warning to him. I have serious doubts about whether he will succeed and that he should think carefully before proceeding, because if he does and he loses, not only will he lose the £20 deposit, more importantly he may have a costs order made against him. That is the main point of the deposit order; a warning from an Employment Judge that if the claimant goes ahead and loses, the claimant will very likely have a costs order made against him or her.

24. I also ought to note that in my view, contrary to Mr Way's submissions, I think that the wages claim is in time. Mr Renford is clearly claiming an unlawful deduction from his hourly rate right up to the point when he stopped working on the TNT site in August 2019 and his claim was issued within 3 months of that.

25. The respondent is correct to point out that a claim for unpaid wages cannot claim wages underpaid any further back than 2 years before the date of issue.

26. Case management orders appear in a separate Order after with and with the agreement of the parties. I explained what was required to Mr Renford.

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Employment Judge M Warren

Date: 3 August 2020

Sent to the parties on: .....

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For the Tribunal Office