Case Number: 1602137/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms Greville**

Respondent: **Gravells Ltd**

Heard at: **Cardiff** **On: 11 September 2020**

Before: **Employment Judge R Harfield (sitting alone, by telephone, in public)**

Representation:
Claimant: Mr Blewitt (lay representative)
Respondent: Ms Duffy (legal representative)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that

(a) the claimant's application to amend her claim to bring a complaint of constructive unfair dismissal under the Employment Rights Act 1996, constructive unfair dismissal under Regulation 4(9) of TUPE, a complaint of wrongful dismissal and a claim for payment of a redundancy payment is granted;

(b) the amended claims are not out of time and the Tribunal has jurisdiction to hear them;

(c) the respondent's applications for a strike out order or a deposit order are refused;

(d) the claim, as amended, will proceed to a final hearing. A separate case management order addresses the listing of that final hearing and preparatory case management steps.

REASONS

Background

1. The claimant presented her original claim on 18 November 2019 bringing a claim for unfair dismissal, redundancy pay, notice pay and holiday pay. Her claim form did not set out the date the claimant's employment terminated. In response to a query from the Tribunal Mr Blewitt confirmed on the 29 November 2019 that the claimant's employment had not terminated, she had not resigned and she was still employed by the respondent (albeit on sick leave). The respondent filed a response form asserting there was no jurisdiction to hear the claimant's case as her employment was continuing. On 8 January 2020 Employment Judge Jenkins indicated that he was considering striking out the claimant's claims on the basis of no reasonable prospect of success as all of the claimant's claims depended on her employment being terminated.

2. On 8 January 2020 Mr Blewitt emailed the Tribunal to ask whether if the claimant resigned (which he said she had intended to do if not dismissed) her constructive dismissal claim could proceed. He said that if not she would resign immediately anyway and submit a new constructive dismissal claim which he said would seem to be little ridiculous. I take that to be a referral to the fact it thought it was unnecessary to potentially have two claims being issued covering the same or highly similar ground. There was no response from the Tribunal and on 14 January Mr Blewitt emailed again to say that the claimant had that day submitted a letter to the respondent to terminate her employment and that "she wishes to continue to claim unfair constructive dismissal as per TUPE regulations."

3. The matter was referred to me on the papers and I decided to treat Mr Blewitt's emails as an application to amend the existing claim. I directed that the emails be copied to the respondent and that they be asked to confirm if they objected to the amendment of the existing claim to bring a constructive unfair dismissal claim and associated claims following the claimant's resignation. Unfortunately, and through no fault of the claimant, the email was not forwarded to the respondent until 9 April 2020.

4. The respondent indicated that they did object to the amendment. A case management preliminary hearing was heard by Employment Judge P Davies on 19 May 2020. He decided to list a public preliminary hearing to consider the respondent's arguments that the first claim and the proposed amended claim are both out of time, that they should be struck out as having no reasonable prospect of success, or a deposit order made, and to consider the amendment application. The amendments sought are to

bring a constructive unfair dismissal claim, a redundancy payment claim and a notice pay claim. There this no holiday pay claim as the claimant was paid this once she resigned.

5. The public preliminary hearing came before me on 30 July 2020 by video. Unfortunately there were technical difficulties which meant it could not proceed and it was instead converted to a case management hearing by telephone. At the case management hearing it was agreed that the public preliminary hearing would be relisted by telephone and I ordered the claimant to provide further information about the proposed amended claim. In particular, to confirm whether the claimant was seeking to bring a constructive unfair dismissal claim under section 95 of the Employment Rights Act of Regulation 4(9) of TUPE (or both) and the basis of any such claim. She was also to set out how she considered herself to be in a redundancy situation.

6. Those draft further particulars were provided on 11 August 2020. I had them before me together with a bundle prepared for the last preliminary hearing and skeleton arguments for that hearing which it had been agreed could be reused. I also heard oral submissions from both parties.

The amendment sought

7. The claimant seeks to bring a constructive unfair dismissal claim under section 95 of the Employment Rights Act 1996. The claimant was directed to set out in chronological order which event or conduct by the respondent she says individually or cumulatively amounted to a breach of an express term of her contract or the implied term of mutual trust and confidence which she said amounted to a fundamental breach of contract entitling her to resign and treat herself as dismissed. She was also directed to set out the most recent act or omission which she says caused or triggered her resignation.

8. In response the claimant sets out three things.

9. First, the claimant says that for over 20 years she was employed as a Book Keeper/ Office Worker and that the work she did was ledger maintenance, banking, invoicing, payments, office duties such as telephone answering, customer bookings, general office administration, IT etc. She says that in April 2019 her employment transferred under TUPE from Garej Raymond Garage Limited to Gravells Ltd (the respondent). She says that the respondent said her employment was to be as a Service Advisor. The job description of that role is at [72 – 73] which in short form revolves around handling income customer calls and enquiries and encouraging customers to make an appointment with the Service

Department. It also revolves around managing the service booking system and allocations.

8. The claimant says that this amounts to a "dramatic" or significant change in her duties. She considered she should have been made redundant.

9. Second, the claimant says that initially from 30 May 2019 to 2 August 2019 she pursued her concerns with the respondent firstly through informal discussions and then through the formal grievance process. She says that the respondent maintained that her role before and after transfer did not differ too much and that she had, before the transfer, been doing at least 50% of the duties of a Service Advisor.

10. Third, the claimant says that during the period 12 August 2019 to 1 November 2019 she made "many requests" to the respondent for detailed information about how the respondent had reached their conclusions so that she could better understand their stance. The claimant says that the respondent failed to provide that information.

11. The claimant says "It was this failure by the Respondent that triggered the Claimant's resignation on 14 January 2020."

12. The claimant also seeks to bring an unfair dismissal claim in the alternative under Regulation 4(9) TUPE. That claim is brought on the basis that the change in her duties on the TUPE transfer amounted to a substantial change in her working conditions which was to her material detriment. She says that the anticipating of carrying out significantly different duties caused her substantial anxiety such that she was on sick leave from May 2019 onwards.

13. The claimant resigned without notice on 14 January 2020. She also seeks to bring a constructive contractual notice pay claim. She also seeks to bring a claim for a redundancy payment on the basis that the respondent already had an employee or employees carrying out similar duties to those she had been doing pre-transfer and that there was little or no requirement held by the respondent for another employee to carry out her particular duties.

The *Selkent* Principles

14. In **Selkent Bus Co Ltd v Moore [1996]** guidance was given by the Employment Appeal Tribunal as to the approach that Tribunals should take to amendment applications.

15. The guidance says that whenever the discretion to grant an amendment is evoked the Tribunal should take account of all the circumstances,

balancing any injustice and/or hardship to both parties when deciding whether to allow or to refuse the amendment. The guidance makes it clear that there are far too many circumstances for any judgment to delineate what amounts to the relevant circumstances, but that the following categories are part of that relevancy process.

16. The first is the nature of the amendment sought. The guidance indicating that applications are of many different kinds ranging from the minor correction of typing errors through to the addition of factual details on existing allegations. The addition and substitution of other labels for facts already pleaded to and the making of entirely new factual allegations which change the basis of an existing claim. On the far end of this spectrum is the substantial alteration pleading a new cause of action.

17. The guidance provides that the applicability of time limits is important when a new cause of action forms the proposed amendment; the hardship to a party may be greater if the new cause of action would be out of time if brought in a separate claim.

18. The guidance then makes it clear that the timing and manner of the application should be taken account of by the Tribunal although it is clear that an amendment should not be refused solely because there is a delay in making it.

19. Each of the above along with any other relevant circumstances are to be take account of as a part of the discretionary balancing exercise. The tribunal should discover why the amendment was not sought earlier. I should take any factors into account which affect that, but I am to consider that relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, adjournments, and any additional costs to a party, particularly if that party is unlikely to recover those costs are also part of that process.

Discussion and conclusions on the amendment application

The nature of the amendment

20. The amended claim largely replicates the complaints the claimant sought to make in her original claim. In the original claim the claimant claimed constructive unfair dismissal, a redundancy payment, and notice pay (as well as holiday pay which is no longer pursued). Within the text at box 8.2 [008] the claimant set out in similar terms to the proposed amendment that she considered the change to Service Advisor was a substantial change to her terms and conditions. She also set out that she had raised her concerns with the respondent informally and through the grievance process and that she disagreed with, and could not understand, the

conclusions reached by the respondent. She set out that she wrote numerous letters in effect seeking to understand the respondent's decision and that "I was not provided with the information requested and so had no recourse other than to assume a refusal to provide the information and to refer my concerns to an Employment Tribunal." The substance of the claimant's constructive unfair dismissal claim under the Employment Rights Act and her notice pay and redundancy payment claims are in effect the same or significantly the same as the amended claim, albeit they correct the problem that the claimant's original claim was premature as it was brought before she had resigned.

21. The claim under Regulation 4(9) of TUPE is set out in more detail in the proposed amendment albeit within the original claim the claimant did say: *"I also suggested to Gravells that, as the Service Advisor post offer to me represented a substantial change in my terms and conditions, and was a consequence of the transfer of Garej Raymond to Gravells, I believed I had a right to terminate my employment, claim constructive dismissal…"* The heart of the claimant's Regulation 4(9) TUPE claim was already there.

22. In my judgment the nature of the amendment sought is therefore not a substantial one compared to the original claim save that it was made after the claimant's resignation to correct the fact that the original claim was prematurely brought.

Time limits

23. Until today the respondent has always maintained that both the original claim and the proposed amended claim are out of time. Their position is set out in their skeleton argument. It is a position on which I said at both hearings before me that I did not understand as the claimant's original claim does not seem to be out of time. To the contrary it seems to be an unviable claim because it was premature. The application to amend the claim was made on 14 January 2020 the same day that it is accepted the claimant resigned summarily terminating her contract of employment. The respondent agrees that the claimant's effective date of termination was 14 January 2020 which is the date that triggers the 3 month time limit (subject to any extension for Acas early conciliation) for presenting the employment tribunal claim[1]. That the application to amend did not ultimately get decided until today or that the full draft particulars were not provided until 11 August 2020 was not the fault of the claimant. The claimant as a litigant in person has done what the Tribunal has directed her to do after the matter was first brought to the Tribunal's attention.

[1] At least for the unfair dismissal complaints and the breach of contract notice pay claim. The time limits are different for a redundancy payment claim but would not produce an earlier limitation date.

24. I pressed the respondent today as to why it was said that the proposed amended claim was out of time and eventually the respondent conceded the point and withdrew that argument. I therefore find that once the claimant had resigned the application to amend was brought within the primary time limits or at least that any delay in the application being heard or in providing the full particulars of the amendment is not something that should prejudice the claimant's application to amend.

The timing and manner of the application

25. The application to amend was promptly made once the claimant resigned. I have said already that the delay in the application being heard or in providing full particulars of the amendment sought is not something I consider the claimant is at fault for as a litigant in person.

Other factors and the overall balance of prejudice and hardship

26. I can take into account the merits of the claims. This is a factor dealt with below in relation to the strike out and deposit applications as it overlaps. I therefore will not repeat those comments here save as to say that I did not consider the respondent's concerns about the merits of the claims such as to tip the balance in favour of refusing the amendment.

27. If I refuse the amendment the claimant will have no claims to bring arising out of the circumstances that she says lead to her ultimate resignation. Her original claim, as Mr Blewitt today conceded, cannot proceed as it was prematurely brought before the claimant resigned and the Tribunal has no jurisdiction to hear it. A fresh ET1 claim form would at the current date be out of time. There would therefore be no claim left to be adjudicated upon. The prejudice to the claimant is clear and real. If I allow the amendment the respondent will have to a defend a claim it could otherwise have avoided. However, I factor in that the situation arose because of the claimant's potential seeming misunderstanding, at least in the latter part of 2019, of the need to resign before bringing her claim and one where the respondent knew the fact the claimant was contemplating proceedings and why since at least May or June 2019 [045, 046a]. The respondent argues the claimant should have known she needed to promptly resign and bring her Tribunal claim (at least in relation to the constructive unfair dismissal claim under section 95 ERA) and that she did not resign in response to any breach of contract that may be found. If I allow the amendment the respondent is however still able to raise those arguments in defence of the Employment Rights Act constructive unfair dismissal claim when arguing their position on (a) why the claimant resigned and (b) whether there was affirmation. They will not be deprived of their ability to argue those points and they can be adjudicated on all the evidence. I am satisfied that the overall balance of prejudice and

hardship means that the claimant's amendment application should be granted.

The respondent's strike out application

The basis of the application

28. The respondent pursues their strike out (or deposit order) application on various grounds. The time limit point I have already dealt with above. The claimant also concedes that the original claim itself was not a good claim as it was premature. However, as set out in my case management order of 30 July 2020 (and the case law referenced there) this does not prevent me allowing the claimant to amend that original "bad" claim and which I have already granted above.

29. The respondent submits in their skeleton argument that the claimant does not have a reasonable prospect of success in her constructive unfair dismissal claim because:

    (i) there was no fundamental breach of contract;
    (ii) the claimant did not resign in response to any breach but resigned in response to the email from the Tribunal of 8 January 2020 indicating that Employment Judge Jenkins was considering striking out the claim because it had no prospect of success (because the claimant had not at that point resigned);
    (iii) The claimant delayed in resigning and affirmed any breach as there was approximately 9 months between the date of the transfer and the claimant's resignation.

30. In oral submissions today the respondent also said that the redundancy payment claim had no reasonable prospect of success because, in effect, the claimant's job had stayed the same and still existed. The complaint under Regulation 4(9) TUPE is said to have no reasonable prospect of success because it is said there was no substantial change to the claimant's working conditions that was to her material detriment. Likewise it is said the notice pay claim has no reasonable prospect of success.

The legal principles

31. Under rule 37(1)(a) of the Employment Tribunal rules of procedure a Tribunal may strike out a claim or part of a claim on the grounds that it has no reasonable prospect of success.

32. Operation of rule 37(1)(a) requires a two stage test. Firstly has the strike out ground (here "no reasonable prospect of success") been established on the facts. If so, secondly is it just to proceed to a strike out in all the

circumstances (which will include considering whether other lesser, measures might suffice).

33. When assessing whether a claim has no reasonable prospect of success the Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely (Balls v Downham Market High School and College [2011] IRLR 217). The Tribunal must take the allegations in the claimant's case at their highest. If there remain disputed facts there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue (Ukegheson v Haringey London Borough Council [2015] ICR 1285). In other words a strike out application has been approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact. A strike out application succeeds where it is found that, even if all the facts were as pleaded by the claimant, the complaint would have no reasonable prospect of success. If a strike out application fails the argument about the overall merit of the claim is not decided in the claimant's favour. Both the claimant and the respondent argue their positions on the merits in full and afresh at the full hearing.

Discussion and conclusions on the strike out application

34. Taking the claimant's case at its highest I do not consider that it has no reasonable prospect of success. In relation to both the different types of unfair dismissal claim, the claimant has set out how she considers the respondent's conduct in (she says) substantially changing her role, and thereafter (she says) not explaining why their position is that there was no substantial change amounts to a fundamental breach of contract. It is a matter for evidence and interpretation at the full hearing but there is some potential support in that analysis, for example, in the account provided by Ms M Williams [058]. The claimant's case, if it is established as pleaded, is sufficiently arguable. The constructive unfair dismissal claim under the ERA would also need to consider the questions of why the claimant resigned and affirmation. However, the breach of contract (if found) need not be the only reason a claimant resigns. The issue of affirmation would need to be assessed on all the evidence and it is important to bear in mind in that regard that the claimant does not say that the breaches of the implied term were limited to the proposed changes to her duties, but continued after that in how, she says, the respondent handled her grievance and enquiries. The notice pay claim in reality flows from the unfair dismissal claims. Again, taking the claimant's case at its highest, the claimant's position is that the redundancy payment claim is founded on the claimant's argument that her role, pre-transfer, was different to the role that the respondent wished to slot her into because, she says, they did not require her to do the job she was doing before and also part of what she

did before did not transfer to the respondent. On the face of it that could potentially amount to a redundancy situation if the claimant establishes her claim as pleaded.

The respondent's deposit order application

The basis of the application

35. The respondent pursues the application as an alternative to their strike out application.

The legal principles

36. Under rule 39 where at a preliminary hearing 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 to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

37. The test is therefore one of "little reasonable prospect of success" as opposed to "no reasonable prospect of success" for a strike out application. In Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames UKEAT/0096/07,the EAT observed:

> *"27. … the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

38. A deposit order application has a broader scope compared to a strike out application and gives the Tribunal a wide discretion not restricted to considering purely legal questions. The Tribunal can have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it. However, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strikeout application because it defeats the object of the exercise. If there is a core factual conflict it should properly be resolved at a full merits hearing: Tree v South East Costal Ambulance Service NHS Foundation Trust UKEAT/0043/17/LA.

Discussion and conclusions on the deposit order application

39. For the reasons already given in respect of the strike out application I am unable to conclude that I have a proper basis for doubting the likelihood of the claimant to be able to establish the facts essential to the claims she is bringing such as to conclude there is little reasonable prospect of success. A mini-trial is to be avoided and whether the claimant succeeds in her complaints depends to a large extent on the findings of fact the Tribunal will make as to the claimant's role pre and post transfer and the extent of any change (if any is found). The claimant's constructive unfair dismissal claim under ERA has other issues to be determined such as whether there were further breaches of the implied term of trust and confidence, the reason for the claimant's resignation and the issue of affirmation but they are also acutely fact sensitive for the reasons I have already given.

Summary

40. The claim in its amended form (as opposed to its original presentation) can proceed to a full hearing. It will of course be decided entirely afresh on the evidence as presented.

_____

Employment Judge R Harfield
Dated: 21 September 2020

JUDGMENT SENT TO THE PARTIES ON 29 September 2020

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS