



EMPLOYMENT TRIBUNALS

Claimant

Mr C Cannings

AND

Respondent

C & G Joinery Limited

HEARD AT:

Watford Tribunal (via CVP)

ON: 2 February 2022

BEFORE:

Employment Judge Douse (Sitting alone)

Representation:

For Claimant: Mr T Staton, Lay representative

For Respondent: Ms Y Montaz, Senior Litigation Consultant

**RESERVED JUDGMENT AT
A PRELIMINARY HEARING**

1. The claim of automatic unfair dismissal is dismissed upon withdrawal.
2. The claim for redundancy is dismissed upon withdrawal.
3. The claim for notice pay is dismissed upon withdrawal.
4. The claim for holiday pay is dismissed upon withdrawal.
5. The Respondent's application for a deposit order in relation to the claim for unfair dismissal is refused.

REASONS

This has been a remote hearing which has been agreed to by the parties. The form of remote hearing was by a video hearing through HM Courts & Tribunal Service Cloud Video Platform. The parties were remote and only the Judge was present at the Hearing Centre. A face-to-face hearing was not held because of the coronavirus pandemic and the ensuing Government restrictions. The relevant matters could be determined in a remote hearing.

Background

1. The Claimant, in a claim form submitted on 22 January 2021, brought claims for:
 - 1.1 automatic unfair dismissal
 - 1.2 ordinary unfair (constructive) dismissal
 - 1.3 redundancy
 - 1.4 notice pay
 - 1.5 holiday pay
 - 1.6 deductions from wages

2. In its response to the claim, the Respondent asserted that the claims should be struck out because the Claimant had failed to particularise their claims, such that they could not sensibly be responded to. In the alternative, the Respondent requested an order for further and better particulars from the Claimant and permission to file an amended response.
3. Consequently, this Preliminary Hearing was listed to determine whether any of the claims should be struck out as they had no reasonable prospects of success, or alternatively the subject of a deposit order as a condition of permitting the Claimant to continue with their claim(s).
4. At the start of the hearing, Ms Montaz confirmed that the Respondent:
 - 4.1 Did not seek strike out or a deposit order in relation to the claim for deduction from wages.
 - 4.2 Sought to strike out the claims for:
 - 4.2.1 automatic unfair dismissal

4.2.2 redundancy

4.2.3 holiday pay

4.3 Sought a deposit order in relation to the claims for:

4.3.1 notice pay

4.3.2 ordinary unfair (constructive) dismissal

Procedure, documents, and evidence heard

5. The Respondent had prepared a bundle of documents amounting to 108 pages – references to page numbers below are to this bundle - and provided witness statements from Mr Mark Cottrell, Managing Director at the Respondent company, and Mr Patrick Howe, an employee at the Respondent company.
6. The Claimant's representative provided a written document setting out a chronology of events, along with supporting documents. This document is effectively the further and better particulars the Respondent says it requires.
7. The Tribunal heard from the Claimant on his own behalf, and Mr Cottrell on behalf of the Respondent.

Findings of fact

8. At various points in the Claimant's oral evidence, and/or via Mr Staton, it was confirmed that the following claims were withdrawn:
 - 8.1 Redundancy – the Claimant had incorrectly ticked the box on the ET1.
 - 8.2 Holiday pay – the Claimant accepted that there was no outstanding holiday pay owed to him
 - 8.3 Automatic unfair dismissal
8. Notice pay
9. As there was no application from the Respondent for strike out or a deposit order in relation to deduction from wages, all that remained for me to consider was the application for a deposit order related to the ordinary unfair (constructive) dismissal claim. Therefore, the

facts that follow relate solely to that claim. Any facts related to wages, or withdrawn claims, are only included for context and background.

10. The Claimant was employed by the Respondent as a joiner from 7 June 1980.
11. The Claimant was self-isolating due to Coronavirus symptoms from 23rd March 2020 to 26th March 2020.
12. On 3 April 2020, the Respondent wrote to the Claimant [Pg 26] informing him that he was to be placed on furlough leave, from 30 March 2020, and would be paid 80% of his usual wages.
13. On 22 April 2020, the Respondent wrote to all employees, advising that furlough leave was ending, and everyone was expected to return to work.
14. Between 24 and 27 April 2020, the Claimant and Respondent exchanged emails about the return to work, with the Claimant stating that he did not feel it was completely safe to return. The Respondent confirmed to the Claimant that he would not be forced back to work, but the furlough scheme was not continuing as there was work available.
15. From 27 April 2020 to end of June 2020, the Claimant received some payments the Respondent.
16. During July 2020, and into August, the Claimant exchanged text messages with his colleague Patrick Howe [Pgs 47 – 62], relating to the Claimant's 'relationship' with a receptionist at the Respondent's office. Essentially, the Claimant had disclosed feelings beyond friendship, and had been disappointed by the response he received.
17. The Claimant also sent text messages directly to the receptionist [Pgs 63 – 71], as well as other communications [Pg 72 – 74].
18. The week commencing 20th July 2020, the Claimant returned to work for some days, which he was paid for. However, he continued to raise issues with the Respondent regarding pay during the subsequent months.
19. On 3 November 2020, the Respondent wrote to the Claimant about his continued absence from work [Pg 35], stating they had concluded that he no longer wanted to work there. The Claimant replied on 10 November [Pg 36], advising he did still want to work for the Respondent but had ongoing concerns about Covid-19 in the workplace.
20. The Claimant also raised a number of grievances with the Respondent, regarding: lack of communication; time off due to the workplace; deductions of wages. The Respondent replied on 27 November 2020 [Pg 38], inviting the Claimant to a meeting on 5 December to discuss the issues.

21. On 1 December 2020, the Claimant resigned advising that he considered himself constructively dismissed [Pg 39]. The Respondent replied on 4 December [Pg 40] - querying whether the resignation was with immediate effect or with notice - and again 11 December [Pg 41] confirming that in the absence of a response the Claimant's resignation was accepted as at 1 December 2020.
22. In oral evidence, the Claimant agreed that he had been affected by the issues with the receptionist, but maintained that he also had concerns around Covid-19 safety in the workplace and ongoing issues about wages.

The law

23. Rule 39 of the Employment Tribunals Rules of Procedure, Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 deals with deposit orders, and sets out:

“Deposit orders 39.—

(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...”

24. In *Hemdan v. Ishmail [2017] IRLR 228*, Simler J, pointed out 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’ (para 10), she stated that the purpose ‘is emphatically not to make it difficult to access justice or to effect a strike out through the back door’ (para 11).

25. That was legitimate policy, because claims or defences with little prospect caused unnecessary costs to be incurred and time to be spent by the opposing party. They also occupied the limited time and resources of Tribunals that would otherwise be available to other litigants. However, the purpose was not to make it difficult to access justice or to effect a strike-out through the back door. Indeed, the requirement to consider a party's means in determining the amount of a deposit order (at rule 39(2)) was inconsistent with that being the purpose. It was essential that when a deposit order was deemed appropriate it did not operate to restrict disproportionately the fair trial rights of the paying party, or impair access to justice. Accordingly, an order to pay a deposit had to be one that was capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum that he was unlikely to be able to raise.
26. The threshold for making a deposit order is that the Tribunal must be satisfied that there is 'little reasonable prospect' of the particular allegation or argument succeeding. This is different from the criteria for striking out a case under rule 37(1)(a) on the ground that the proceedings have 'no reasonable prospect of success'. There must be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response: *Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors* EAT 0096/07.

Conclusions

27. In the circumstances, applying the overriding objective to deal with cases fairly and justly, I cannot say that the Claimant's claims have little reasonable prospect of success at this stage. The Claimant has provided sufficient details regarding what preceded his resignation to potentially establish the claim of unfair (constructive) dismissal.
28. Therefore, it would be premature to make a deposit order and, thus, the Respondent's application for a deposit order is refused.
29. This does not mean that the Claimant's claims will definitely succeed at a final hearing and the Claimant may be wise to seek specialist advice and assistance from Citizens Advice, a Law Centre or through the ELIPS scheme (details of which can be obtained from the Tribunal office) before proceeding further.
30. The remaining claims will be the subject of a full merits hearing – further directions will be sent to the parties separately.

31. If the Respondent still requires further and better particulars regarding the claims of unfair dismissal and deduction from wages, it can request these directly from the Claimant. The Respondent is given permission to file an amended response within 14 days of this judgment being sent to parties, or following request for and receipt of further and better particulars.

Employment Judge K Douse

Dated: ...29 April 2022.....

Sent to the parties on: 3 May 2022

For the Tribunal Office

Public access to employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-Tribunal decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.