



EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Johnson
Respondent: Aurora Lighting UK Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Watford (by CVP) **On:** 11 October 2023
Before: Employment Judge Alliott (sitting alone)

Appearances

For the claimant: Mr Ed Williams KC (counsel)
For the respondent: Ms Carolyn D'Souza (counsel)

JUDGMENT

1. The respondent's application for a deposit order is dismissed.

REASONS

1. This closed preliminary hearing was ordered by Employment Judge Varnam on 1 August 2023. The purpose of the further preliminary hearing is to consider and decide upon the respondent's application for a deposit order. In his case management summary Employment Judge Varnam set out:-

“As set out during Ms D'Souza's submissions on this point, I understand that the key basis for seeking a deposit order is that it is said that the claimant has little reasonable prospect of establishing that he was dismissed on any date later than 18 August 2022, and that accordingly he has little reasonable prospect of showing that his claim has been brought in time.”

2. In fact the application by the respondent for a deposit order made on 5 July 2023 puts the basis of the application as follows:-

“It is the respondent's case that these claims have little reasonable prospect of success on the basis he is unable to identify his effective date of termination; or his alleged effective date of termination is the transfer date (18 August 2022) and therefore his dismissal claims are out of time (for the same reason as his failure to inform and consult claim).”

The material before me

3. I had a bundle of 147 pages. In addition I had a witness statement from Mr Sebastien Bonneville. Both parties provided me with 12 page submissions on the law and issues for which I am grateful.

The law

4. Ruel 39 of the Employment Tribunal Rules of Procedure provides as follows:-

“39(1) 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 (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.”

5. In addition Ms D’ Souza has made the following submissions to me which I accept:-

“When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues, and is entitled to have regard to the likelihood of the party being able to establish “the facts essential to his case”. As part of that assessment, a tribunal is entitled to conduct a provisional assessment of credibility of the assertions being put forward.”

And

“Further, the test of “little prospect of success” is “plainly not as rigorous” as the test for strike out on the grounds of no reasonable prospect of success. The less rigorous test for a deposit order allows a tribunal “greater leeway” than when considering whether or not to order strike out.”

6. In addition Mr Williams has submitted to me the following:-

“It is trite law that the EDT is the date on which the employee learns of their dismissal or has a reasonable opportunity of learning of it: Gisda Cyf v Barratt [2010] ICR 1475 SC.”

The relevant facts

7. The agreed list of issues recites as follows:-

“The parties agree that there was a “relevant transfer” pursuant to Regulation 3(1) of the Transfer of Undertakings Protection of Employment Rights 2006 from Aurora Ltd (the transferor) to the respondent (the transferee) on 18 August 2022.”

8. For the purposes of this application I approach the matter on the basis that the claimant was employed by the transferor immediately prior to the transfer and that he was part of the economic entity transferred. Both of these issues are disputed by the respondent but, as I say, for the purposes of this application I have to take the case at its highest.
9. Accordingly, I have to approach this application on the basis that a transfer of the claimant’s contract of employment did take place on 18 August 2022.
10. The relevance of the date of 18 August 2022 is that, if it was the effective date of termination of the claimant’s contract of employment with the respondent, then

the three month primary limitation period would have expired on 17 November 2022. The date the claimant notified Acas was 18 November 2022. Consequently, if the EDT was on 18 August 2022 then he has presented his claim one day late and time issues come into play.

11. There are a number of pleaded issues that the claimant relies upon in support of his contention that he was not only transferred but also that the effective date of termination of his transferred contract of employment was after 18 August 2022. I am not dealing with the contention relating to transfer.
12. I have to examine whether the claimant has little reasonable prospect of successfully showing that the effective date of termination of his contract of employment was after 18 August 2022. It is common ground between the parties that there was no direct communication from the transferee respondent to the claimant that his contract of employment had been terminated on 18 August 2022 or, indeed, thereafter. There was a communication from the administrators of the transferor on 25 August 2022 but the relevance of that is not so much as to when the claimant's contract of employment was said to have terminated but when that was communicated to the claimant which was obviously after 18 August 2022.
13. It seems to me that references to antecedent negotiations as to what was to occur on 18 August 2022 go to the issue as to whether or not the claimant did in fact transfer on that date which is, again, not something that I am dealing with today. I have not been taken to any evidence whatsoever that suggests that the claimant was told that on 18 August 2022 he would TUPE transfer to the transferee respondent and immediately on the same day his transferred contract of employment would come to an end.
14. Having taken into account all the circumstances of the case and the matters placed before me, in my judgment I cannot conclude that the claimant has little reasonable prospects of successfully showing that his effective date of termination of his contract of employment with the respondent was after 18 August 2022. Consequently I decline to make a deposit order.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

Further orders

15. Because this case has been listed for seven days, 23 June - 1 July 2025, I made enquiries at listing to see if an earlier seven day case was available. Seven days by CVP is available from 17 June - 25 June 2024 and consequently I have offered those dates to the parties.
16. The parties are to inform the tribunal in writing by **4pm, 18 October 2023** whether the trial dates of 17 - 25 June 2024 (by CVP) are acceptable and that the existing trial dates of 23 June - 1 July 2025 are to be vacated. If the new trial

dates are accepted then the existing case management orders in relation to the provision of bundles to the tribunal and exchange of witness statements may need to be altered which should be a matter of agreement between the parties.

Employment Judge Alliott

Date: ...26 October 2023

Sent to the parties on:

6 December 2023.....

For the Tribunal:

.....