



EMPLOYMENT TRIBUNALS

Claimant

Miss R Smith

Heard at Watford

Before: Employment Judge Manley

Representation

For the Claimant: Mr P Smith, counsel

For the Respondent: Mr J Mitchell, counsel

Respondent

London Borough of Haringey

On: 11 August 2023

PRELIMINARY HEARING JUDGMENT

JUDGMENT having been given orally to the parties on 11 August 2023, the short judgment sent on 17 September 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, on 27 September 2023, the following reasons are provided:

REASONS

Introduction

- 1 This preliminary hearing was listed to consider the respondent's application to strike out the claim or part of it as an abuse of process. The present claim (case no 330375/23) is a claim for unfair dismissal and holiday pay (as unlawful deduction of wages and/or breach of contract). The claimant objected to the application which related to the fact that the claimant had presented an earlier claim against the respondent on 7 March 2022 (case no 3302814/22) which had been withdrawn on 20 October 2022. There had been an even earlier claim in 2020 (case no 330569/19) but that was settled with a COT3 and is hardly relevant to the application. The preliminary hearing was also to deal with case management for the progression of the case.

The hearing

- 2 At the commencement of the hearing, it was necessary to clarify what documents had been sent electronically as I did not have them all. They were forwarded to me and included a file of documents, legal authorities and skeleton arguments. I then took a short break to read the essential documents and it was clarified by the respondent's representative that the application to strike out only related to the holiday pay part of the claimant's claim. I then heard oral submissions and gave oral judgment. We then moved on to case management for the merits hearing which is listed for July 2024.

Submissions and law

- 3 The respondent's case, in summary, is that the holiday pay part of the claim should be struck out as an abuse of process, applying the principle in *Henderson v Henderson*. Its case is that the claim for holiday pay should have been brought in earlier proceedings. It is not argued that the holiday pay claim *was* brought in the earlier proceedings but that it *should* have been.
- 4 I was asked to consider several cases on the *Henderson v Henderson* principle, including *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46, *Agbenowossi-Koffi v Donvand Limited* [2014] EWCA Civ 855 CA and *Johnson v Gore Wood* [2000] 2 AC1. In particular, it is submitted, I should consider what are said to be the Johnson principles because, in that case, as in this, the previous claim was withdrawn. Those principles include the requirement for the court to make a "*broad, merits based judgment*" and consider whether "*a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*". It is not necessary for there to be harassment of the other party to the litigation (*Agbenowossi-Koffi*).
- 5 In oral submissions, Mr Mitchell took me to the relevant pages of the file of documents. I can see that there was no claim for holiday pay in the 2022 claim but it is submitted that the period of holiday claimed under paragraph 57a of this claim was one which should have been brought in that claim.
- 6 The claimant vigorously opposed the application to strike out the holiday pay claim. Mr Smith referred me to Regulations 13 and 14 of the Working Time Regulations 1998, pointing out that compensation for untaken holidays cannot be paid until after termination of employment and that there had been adjustments during the pandemic to allow carrying forward of holidays. The claimant's case is that she could not have brought the holiday pay claim in either of her earlier claims because she was still employed. It is agreed that a broad merits based approach is what is required

and it was submitted that this claim for holiday pay is not an abuse of process.

- 7 There was some discussion about whether the holiday pay claim was being brought as unlawful deduction of wages or a breach of contract claim, which could not, in any event, be brought whilst the claimant was still in employment, which she was until this claim was presented. At the moment, in the agreed list of issues both heads of claim are pleaded.

Conclusions

- 8 I accept that many of the arguments and the cases to which I was referred are concerned with there being finality in litigation. I decided not to strike out the holiday pay claim. The principles are relatively clear and where a claim should have been brought in a claim, it may amount to an abuse of process, if it is brought in subsequent claims.
- 9 The first thing to note is that the claimant did not bring a holiday pay claim in the 2022 claim but did bring one for unfair dismissal. She withdrew that claim, it seems because she got legal advice and was still in employment. Her claim now for holiday pay spans years from 2020-2021 and 2021-2022 (and some in 2022-2023). I cannot find that these claims should have been included in previous claims, not least because, in part, they rely on the special pandemic rules about carrying over of leave. The very fact that compensation of untaken holiday and a breach of contract claim can only be awarded after employment has ended, means the claimant could not have brought the holiday pay claim any earlier than she has. The principles in *Henderson v Henderson* simply do not bite in a case like this.
- 10 I do not find that bringing this holiday pay claim amounts to an abuse of process. It does not amount to harassment and, applying a broad merits-based assessment, this is not a matter which should be struck out. The respondent will have to defend the unfair dismissal claim in any event and has not had to consider its response to a holiday pay claim before. The holiday pay claim was not claimed in the 2022 claim and, in any event, it cannot be said it should have been raised there as compensation cannot be paid until the employment has ended.
- 11 There is no strike out of the claim for holiday pay as it is not an abuse of process. The claim proceeds to be determined along with the claim for unfair dismissal.

Employment Judge Manley

Dated 11 December 2023

Sent to the parties on:
15 December 2023

For the Secretary to the Tribunals