Case No: 1400673/2024

EMPLOYMENT TRIBUNALS

Claimant: Miss J Smith

Respondent: NG Bailey Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Bristol **On:** 9 May 2025

Before: Employment Judge Livesey

Appearances
For the Claimant: In person
For the Respondent: Mr Welch, counsel

JUDGMENT

1. The Claimant's complaints in relation to her flexible working application under s. 80H of the Employment Rights Act and for breach of contract relating to notice under the Extension of Jurisdiction Order 1994 are dismissed since they have no reasonable prospects of succeeding within the meaning of rule 38 of the Employment Tribunals Procedure Rules.

2. The remaining claims proceed in accordance with the Case Management Order of even date.

REASONS

Background

1. The Claimant was employed by the Respondent as a Hinckley Support Operative (HSO) at Hinckley Point C (HPC), a nuclear power station which was being developed in Somerset. She had been employed for less than a year, between 8 November 2022 and a date in October 2023 which was disputed.

2. The Claimant was suspended in September 2023 following allegations in relation to her clocking in/out of work on site.

3. It was the Respondent's case that it had to have been able to know who was on site at any particular time from a health and safety perspective and that the clocking in/out requirement was a reasonable and sensible manner

of monitoring that. It was alleged that the Claimant had initially indicated a reluctance to clock in/out to Ms Sudds in HR due to the fact that she had to queue in a confined space. An alternative entrance was provided for her use. The Claimant alleged that an additional arrangement, to allow Mr Hastilow to clock in/out for and to her sign her timesheets, was also agreed. That aspect was not accepted by the Respondent.

4. The Respondent's case was that, in September 2023, her clocking in/out records were reviewed and it was noted that she had failed to clock in/out on a number of occasions. She was the subject of a disciplinary process which resulted in her dismissal for gross misconduct; it was concluded that she had left site early on 31 occasions between 3 July and 7 September and, on 15 of those occasions, she had failed to clock out at all. An appeal against that decision was dismissed.

5. The Respondent had applied to strike out elements of the claim and/or had sought deposit orders. The initial application was set out in its letter of 31 January 2025. At that stage, however, many more claims were still 'live'.

6. The Judgment and Case Summary produced following the hearing on 15 and 16 April 2025 resulted in a much more focused list of issues and the Respondent's January letter did not relate to much of which remained. After some initial discussions around the issues, Mr Welch clarified that the application pursued at this hearing was confined to two claims; those in relation to flexible working and breach of contract relating to notice. Any page numbers cited below are two pages within the hearing bundle which the Respondent produced for use at hearing and have been provided in square brackets.

Principles

7. Under rule 38 of the Employment Tribunal Procedure Rules 2024, a tribunal could strike a claim out if it appeared to have no reasonable prospect of success. In other words, that it was "*bound to fail*" (*Twist DX-v-Armes* UKEAT/0030/20/JOJ). It was a two-stage process; even if the test under the rules was met, a judge also had to be satisfied that his/her discretion ought to have been exercised in favour of applying such a sanction (*HM Prison Service-v-Dolby* [2003] IRLR 694).

8. Striking out a claim was a draconian step and numerous cases had reiterated the need to reserve such a step for the most clear and exceptional of cases (for example, *Mbuisa-v-Cygnet Healthcare Ltd* UKEAT/0119/18).

9. All of the available material had to be considered on such an application (see *Balls* above). Sometimes it may have been appropriate to resolve key factual dispute by hearing evidence even at a preliminary hearing (as in *Eastman-v-Tesco Stores* [2012] All ER (D) 264), but it would not ordinarily have been appropriate to do so (*Kwele-Siakam-v-Co-Operative Group Ltd* EAT 0039/17).

10. Where a tribunal considered that any specific allegation, argument or claim had little reasonable prospect of success it may choose, in the alternative,

to make a deposit order (rule 40). If there was a serious conflict on the facts disclosed on the face of the claim and response forms, it may have been difficult to judge what the prospects of success truly were (*Sharma-v-New College Nottingham* [2011] UKEAT/0287/11/LA). Nevertheless, a judge can take into account the likely credibility of the facts asserted, the likelihood that they might have been established at a hearing (*Spring-v-First Capital East Ltd* [2011] UKEAT/0567/11/LA) and/or their inherent implausibility (*Ahir-v-British Airways* [2017] EWCA Civ 1392).

Discussion and conclusions

11. In respect of the complaint of wrongful dismissal, the Respondent asserted that the Claimant had been entitled to notice of one week's notice under her contract [166]. Her weekly gross pay was £551, based upon a 38 hour week [169] and her last payslip clearly showed a payment for that sum as 'PILON' [170].

12. Further, Mr Welch argued that the Claimant had accepted in her Particulars of Claim that the correct notice had been paid (paragraph 28.4 [23]), but she had asserted that other elements were not (holiday pay and bonuses). Those other elements might have been reflected in other claims, but they did not themselves affect the fact that the Respondent had met its duty to pay her notice pay.

13. The Claimant would not respond to the Respondent's application by way of oral submissions. She did not wish to be drawn into any debate because she said that she wished to preserve her position on appeal in respect of the April hearing (see paragraph 95 of the Case Summary of even date). She did, however, seek to rely upon her previous skeleton argument and a further document within the bundle [129-133].

14. The Claimant's skeleton argument for the last hearing concentrated upon her request for a restricted reporting order and her disabilities. Although the notice pay claim was referred to within paragraph 71, it was not addressed beyond that. Within pages [129-133], no further submissions were made on that claim either.

15. Since there was no dispute that the Claimant had received her notice pay and since there was nothing to indicate that it had not been calculated correctly in relation to the entitlement set out in her contract (one week) and since the Claimant did not herself advance any arguments to counter those deployed by Mr Welch, it was concluded that that claim had no reasonable prospects of succeeding for the reasons advanced by the Respondent and it was dismissed under rule 38.

16. The flexible working claim was more difficult to discern as it had not been discussed before Judge Bax (paragraph 81 [88]), but it was at least recorded *as* a claim (paragraph 52 (e) [84]). Again, the Claimant would not be drawn upon the nature and extent of that claim for the same reasons as those set out in paragraph 13 above.

17. It was clear, however, from the documents created by her, that she relied upon a flexible working application that had been made on 7 September

2023 [111] and that she had asserted that the Respondent had not considered it reasonably since it had not responded within three months, as required under s. 80G (1B)(a). Although the time period had since been reduced to two months following the Employment Relations (Flexible Working) Act 2023 from 6 April 2024, the operative period had still been three at the relevant date.

18. The Claimant was dismissed with effect from 18 October 2023 according to her Claim Form [8 & 23]. Whilst she asserted that the discrimination that she suffered continued beyond that to 30 November, it was difficult to see how the Respondent could have been criticised for having failed to respond to a flexible working request when the period in which they had to respond had not lapsed by the date of her dismissal, whether it had been on 18 October or 30 November. Accordingly, that claim had no reasonable prospects of succeeding and was also dismissed.

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Employment Judge Livesey
Date: 9 May 2025

JUDGMENT SENT TO THE PARTIES ON
23 June 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/
written record of the decision.