EMPLOYMENT TRIBUNALS

Claimant: Mr I Michalakis

Respondent: Blackpool Teaching Hospitals NHS Foundation trust

HELD AT: Manchester **ON:** 24 May 2017

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Mr A Bousfield, Barrister
Respondent: Mr E Williams, Solicitor

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant shall pay a deposit of £250 by Friday 7 July 2017 as a condition of continuing to advance his claim for a contractual redundancy payment.

2. The other applications by the respondent for strike out and/or deposit orders are dismissed.

REASONS

1. In a letter dated 3 March 2017 the respondent applied to strike out some of the claimant's claims under rule 37 or in the alternative for a deposit order under rule 39 of the 2013 Rules of Procedure. The application was made in relation to the claims for a contractual redundancy payment and in respect of “ordinary” unfair dismissal.

2. In a letter dated 12 May 2017 the respondent also sought similar orders with respect to the claimant's claim alleging the making of unlawful deductions from his wages.

The Relevant Law

3. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides that:

> "(1) At any stage of the proceedings…on the application of a party, a Tribunal may strike out all or part of a claim…on any of the following grounds –
>
> (a) That it…has no reasonable prospect of success…"

4. Rule 39 provides that:

> "(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 to pa a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
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> (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.
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> (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.
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> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
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> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order –
>
> (a) The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 (unless the contrary is shown); and
>
> (b) The deposit shall be paid to the other party…otherwise the deposit shall be refunded."

5. Mr Williams referred to **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126** in which the Court of Appeal held that It will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

6. Mr Bousfield referred me to the judgment of Lord Clark in **Tayside Public Transport v Reilly [2012] IRLR 755**, Ct Sess (Inner House) in which he summarised the position as follows:

> "Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts. There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example where the alleged facts are conclusively disproved by the productions. But in the normal case where there is a 'crucial core of disputed facts' it is an error or law for the Tribunal to pre-empt the determination of a full hearing by striking out."

7. Mr Bousfield also referred to the case of **Balls v Downham Market High School [2011] IRLR 217 EAT** in which Lady Smith held that:

> "If a claim is struck out, from a claimant's perspective, his employer has 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well-founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that strike out is often referred to as a draconian power. There are cases where fairness as between parties and the proper regulation of access to Employment Tribunals justifies the use of this important weapon in the Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached. Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success…the Tribunal must first consider whether, on a careful consideration of all of the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail, nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test."

Contractual Redundancy Payment

8. In his amended particulars of claim at paragraph 38:

> "In the alternative the claimant avers that the reason for his dismissal was redundancy and that he was contractually entitled to a redundancy payment within NHS rules and terms of service having six years of reckonable service. The Trust have withheld such redundancy payment."

9. In response the respondent denies that the claimant is entitled to a contractual redundancy payment pleading:

> "This allegation is misconceived. This was not a redundancy situation. There was no reduction in the respondent's requirement for employees to carry out the work of a breast surgeon. The requirement for three substantive breast surgeons remained constant throughout the relevant period for the purposes of this claim. The claimant worked for the Trust as a locum, in the place of a substantive consultant. The claimant was well aware that this was the case."

10. Having heard from the claimant's solicitor and having considered the documents referred to by him, and then having heard evidence from the claimant, considered the documents referred to by him and also the submissions made by counsel on behalf of the claimant, I am unable to find that this claim has no reasonable prospect of success. It is apparent that there is a factual dispute as to whether or not the claimant was recruited in the place of a substantive consultant and as to what may or may not have been said to the claimant by the respondent's Clinical Director during a meeting on 26 April 2016 prior to a meeting between the claimant and the respondent's Mr Millner on Tuesday 10 May 2016 at which the claimant was informed that his locum contract would terminate on 8 June 2016.

11. In relation to the making of a deposit order the respondent's solicitor referred me to the case of **Shrewsbury & Telford Hospital NHS Trust v Dr S K S Lairikyengbam UKEAT/0499/08/DM** where the Employment Appeal Tribunal's judgment was handed down on 21 August 2009 by the Honourable Mrs Justice Slade.

12. Quoting from the judgment:

> "(53) For a dismissal to be held to be by reason of redundancy it must be wholly or mainly attributable to the fact that the requirements of the employer for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish. The regulations apply to appointments to 'consultant posts'. There was no evidence before the ET that the Trust had a locum consultant cardiologist post.
>
> (54) Regulation 5 permits the appointment of a person for employment in a consultant post for a short term 'pending the appointment of a permanent post holder'. Such a person occupies the post 'locum tenens', literally 'holding the place'. The regulations do not provide for locum consultant posts to be established independently of the substantive post which is being held on a temporary basis by a locum. The evidence did not support a conclusion that the Trust had a requirement for a locum consultant cardiologist in addition to a consultant cardiologist. There was no suggestion in the evidence before the Employment Tribunal that the claimant would continue as a locum once a consultant cardiologist had been appointed on a permanent basis.
>
> (55) The label of redundancy initially given by the Trust to the dismissal of the claimant did not affect its proper characterisation. There was no evidence that the requirement for a consultant cardiologist had ceased or diminished on the termination of the claimant's appointment. In our judgment the conclusion of the Employment Tribunal that the work of a locum was materially distinguishable from that of a consultant cardiologist and that the Trust has a requirement for an employee to carry out the work of a locum consultant cardiologist in addition to its requirement for an employee to carry out the work of a consultant cardiologist was not one which was open to it on the evidence. In our judgment the findings of fact by the Employment Tribunal and the applicable regulations do not support a conclusion that the claimant

> was dismissed for redundancy when his locum consultant contract came to an end. Accordingly the ET reached a perverse conclusion in deciding that he was dismissed for redundancy."

13. In this case the respondent did not extend the claimant's locum contract. It told the claimant that it would be advertising a substantive consultant post following the termination of his locum contract. The claimant applied for the substantive post but was not appointed to it.

14. In these circumstances it seems to me that the contention that the reason for the claimant's dismissal was redundancy is one that has little reasonable prospect of success and that the claimant shall be ordered to pay a deposit as a condition of continuing to advance the argument.

Unfair Dismissal

15. In his amended particulars of claim at paragraph 37:

> "The claimant avers that he was unfairly dismissed further to section 98 Employment Rights Act 1996."

16. The respondent denies this allegation pleading that:

> "The decision to terminate the claimant's employment was fair in all the circumstances. In particular, the claimant was informed, by Mr Millner, in the meeting on 10 May 2016 (and in writing on 11 May 2016) that the reason for the termination of his employment was the expiry of his locum contract as the respondent had decided to recruit to the substantive post. The claimant was encouraged to apply for the substantive post when it was advertised."

17. The claimant's pleaded case is no more than an allegation. It is in addition to an allegation of automatic unfair dismissal. The reason for the claimant's dismissal is a matter that is contentious between the parties. I am unable to find that such a claim has no reasonable prospect of success.

18. As to whether it has little reasonable prospect of success, the unfair dismissal claim involves the Tribunal, if it finds that the claimant was dismissed for a potentially fair reason, considering the question of the fairness of the dismissal with a neutral burden of proof in accordance with section 98(4) of the Employment Rights Act 1996. On the basis of the information and the evidence before me and the submissions that I have heard from both advocates I am unable to conclude that this claim has little reasonable prospect of success.

Unlawful Deductions from Wages

19. In his amended particulars of claim at paragraph 39:

> "The claimant had a job plan agreement starting from 1 July 2015 for 12 PAs to the end of the contract. The claimant was only paid 10 PAs, and therefore 2 PAs for the material time have been unlawfully deducted. The claimant requests payments of these deducted amounts."

20. The respondent denies this allegation pleading that:

> "It is denied that the claimant's job plan was formally agreed at 12 PAs. Therefore no entitlement to be paid for an additional 2 PAs ever came into being. Rather, the claimant was paid for 10 PAs and received various additional payments. No unlawful deductions have therefore been made from the claimant's salary."

21. Although provision had been made for the parties to exchange documents relevant to the matters to be determined at the preliminary hearing, the claimant produced on his tablet a document which he said related to an agreement with the respondent for 12 rather than 10 PAs. This agreement may not have been concluded but shows that there are factual disputes between the parties such as preclude me from concluding that this claim has no reasonable prospect of success.

22. Given that there is likely to be further documentation to be disclosed on either side in relation to this issue, I conclude that at the preliminary hearing stage I am not able to find that this claim has little reasonable prospect of success.

The Claimant's Means

23. The claimant told me that although he was well remunerated when employed by the respondent he had, since the termination of his locum contract, had a period of unemployment such that his income in the past year was reduced by some 50%. He only had a very small sum in the bank. He was currently working as a locum.

Conclusion

24. Taking into account his means I order the claimant to pay a deposit of £250 by Friday 7 July 2017 as a condition of continuing to advance the argument that he is entitled to a contractual redundancy payment.

Employment Judge Sherratt

31 May 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 June 2017

FOR THE TRIBUNAL OFFICE