



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L Smith

**Respondent:** Dorothy House Hospice Care

**Heard at:** Bristol **On:** 5<sup>th</sup> October 2021

**Before:** Employment Judge P Cadney

**Representation:**

Claimant: Mr P Andrews (Lay Representative)

Respondent: Mr A Leanhardt (Counsel)

## PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claim for unpaid notice pay is dismissed as having no reasonable prospect of success.
- ii) The claimant's claim for unpaid holiday pay will proceed to hearing unless resolved.
- iii) The claimant is ordered to pay a deposit as a condition of being permitted to pursue her claim for unfair dismissal (see accompanying deposit order).

### Reasons

1. By a claim form submitted on 8<sup>th</sup> February 2021 the claimant brings claims of unfair dismissal, unpaid notice pay, and unpaid holiday pay. The respondent resists all the claims and in its Response submitted that all of the claims either had no reasonable prospect of success and/or little reasonable prospect of success, and applied for a preliminary hearing to determine whether all or any of the claims should be struck out or a deposit ordered. By a Notice of Hearing dated 8<sup>th</sup> June 2021 the case was listed for today to determine those applications and to give further directions as necessary.

2. Background Facts (This is a brief summary of the chronology as set out in the documents and does not involve make any finding of fact) - The respondent is a charity which operates 25 charity shops and employs some 120 retail staff. In March 2020 as a consequence of the pandemic all staff were furloughed and all the stores shut with the result that it ceased to generate any revenue. In order to cut costs it decided to change the terms of retail employees. On 25<sup>th</sup> June 2020 an informal consultation meeting was held and on 8<sup>th</sup> July copies of the proposed new contract together with a summary of the changes were sent. Following feedback changes were made to the proposed sickness absence terms and a revised contract sent on 28<sup>th</sup> July. On 4<sup>th</sup> August the claimant stated that she would not consent to the change. At that stage 13 staff had withheld consent and the HR Director Mr Rees met the other twelve. Following those meetings 11 signed the new contract leaving only the claimant and one other employee who would not. Between then and her dismissal the claimant maintained her position in respect of the new contract and declined to meet Mr Rees to discuss it. On 7<sup>th</sup> September she wrote saying that she had taken legal advice; that she refused to sign the new contract; that she did not wish to meet Mr Rees; and understood that in consequence it was the respondent's intention to terminate her employment. On 9<sup>th</sup> September she was dismissed with notice terminating on 11<sup>th</sup> November (although this was subsequently extended as is set out below) and offered re-employment on the new terms which she did not accept.
3. Notice Pay – In the claim form the claimant asserts that she has been underpaid notice pay in the sum of £940. The respondent asserts that she was dismissed with notice on 9<sup>th</sup> September 2020 and that the letter required her to take all unused holiday in that period. On 4<sup>th</sup> November the claimant wrote asserting that she was owed 64 hours in untaken holiday entitlement, and that as she was off sick that it was unlawful to require her to take holiday during her period of sickness absence. The respondent dealt with this by extending her notice period from 11<sup>th</sup> November 2020 until 30<sup>th</sup> November, paying the period beyond the expiry of her sick note as holiday pay and made an additional payment of £240.92 representing the balance.
4. In terms of notice pay the respondent therefore contends that the claimant as a matter of fact, supported by the documentary evidence, had a notice period from 9<sup>th</sup> September until 30<sup>th</sup> November which exceeded any statutory or contractual entitlement and that her claim for notice pay is bound to fail.
5. In oral argument the claimant contended that the claim for unpaid notice pay is based on the proposition that it was inappropriate to be given notice whilst she was absent through sickness. She did not have any authority to support this assertion, and as I indicated I am not aware of any legal principle that prevents an employer giving

notice during sickness absence; and in my judgement this claim has no reasonable prospect of success and will be dismissed.

6. Holiday Pay -For the reasons set out above the respondent contends that the claimant has received all holiday pay owed to her. In the ET1 she alleges that she is still owed £490 in total; although it is not clear how this is calculated. The claimant submitted that the mechanism used by the respondent to pay sick pay at least in part was to allow the government to pay some of the holiday under the furlough scheme. This may or may not be correct but the tribunal is only concerned with whether the employee had received the correct amount of holiday pay. The claimant submits that she has not had a fully itemised breakdown and so does not know whether she has been paid in full.
7. I have no specific evidence as to the calculation of the holiday pay and there does not appear to be at present and on the information before me any basis for asserting that this claim has little or no prospect of success.
8. Unfair Dismissal – The claimant was dismissed because she refused to accept new contractual terms. The respondent submits that there is a wealth of authority that this is a potentially fair reason for dismissal which is clearly correct (some other substantial reason – s92 Employment Rights Act 1996 – see for example *Catamaran Cruisers v Williams EAT [1994] IRLR 386*), that there is no significant dispute of fact, and that dismissal was clearly fair in this case for the following reasons :
  - i) The new contractual terms were introduced in response to the fall in income caused by the closure of its retail stores during the pandemic and that the respondent self-evidently had a sound business reason for seeking to reduce costs and introducing them;
  - ii) That the reasons for the changes and the detail of the changes were clearly set out and it consulted all the workforce about them;
  - iii) Following consultation 118 of 120 retail employees accepted the changes;
  - iv) The claimant declined to participate in consultation having taken legal advice and acknowledged the likely consequence of doing so, and at the time of dismissal they did not know and could not have known to which of the new terms she objected and why;
  - v) They were left simply with a bare refusal to accept terms which had been agreed by 98% of the workforce. The only options were dismissal with an offer of re-engagement on the new terms, or permitting her to remain on her existing contract without her having participated in the consultation so as to give them any reason to do so.

vi) As the test for the tribunal is to judge the reasonableness of the dismissal on the basis of the information available to the employer at the time the proposition that it was unfair to dismiss in those circumstances on any analysis has little reasonable prospect of success and in reality no reasonable prospect.

9. The claimant submits that :

i) That the proposed new contract was markedly disadvantageous (in oral argument she highlighted in particular clauses 12 and 18) and the claimant was correct or at least entitled, to consider it "awful". Whilst the respondent may be able to justify the imposition of new terms it does not follow that these specific terms were reasonable.

ii) She could not be compelled to participate in consultation and the respondent should have been able to identify for itself the substantial disadvantages of the proposed new contract particularly in the light of a grievance she had lodged in 2018;

iii) The retail employees were engaged on a number of different types of contract and that the fact that 118 agreed to the new terms does not mean that it was unreasonable of her to refuse to do so. There is no reason why she could not have been permitted to remain on her existing terms.

iv) In the circumstances there is enough to say that there are issues to be determined at a final hearing and that it is not appropriate either to strike out this claim or order a deposit.

10. I am just persuaded that this is not a case which should be struck out as having no prospect of success. However I am of the view that a deposit should be ordered. The essential difficulty for the claimant is that her case is predicated on the individual disadvantage that she would suffer under the imposition of the new terms but in the absence of participating in the consultation there was no information as to any reason for the refusal communicated at the time the decision to dismiss was made. The respondent is correct that the task for the tribunal is not to substitute its own view but to determine whether the decision to dismiss was reasonably open to the respondent on the basis of the information before it at the time. In those circumstances in my judgement the claim has little reasonable prospect of success. Having heard from the claimant as to her means the amount of the deposit order will be £50.

### Directions

11. The claimant will have 21 days from receipt of the order in which to decide whether to pay the deposit and pursue her unfair dismissal claim. In relation to the holiday pay claim the respondent has

indicated that it has the details of how her holiday pay claim was calculated which can be provided to the claimant.

12. The parties are directed to notify the tribunal within **28 days** of the date of promulgation of this order :-
  - i) Whether the deposit has been paid and the claimant is pursuing the unfair dismissal claim;
  - ii) Whether the holiday pay claim is being pursued or as been resolved.
13. The EJ will then give further directions if necessary.

### **CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge P Cadney  
Dated: 6 October 2021

Sent to parties: 2 November 2021

FOR THE TRIBUNAL OFFICE