EMPLOYMENT TRIBUNALS

Claimant: Miss Claire Lenehen

Respondent: E.ON Energy Solutions Limited

PRELIMINARY HEARING

Heard at: Nottingham (in public) **On:** 20 September 2017

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondent: Miss A Smith, counsel

REASONS

1. These are the written version of the reasons given orally at the hearing for not making deposit orders, which were requested after the hearing by the respondent's solicitors.

2. This was a preliminary hearing to deal with whether deposit orders should be made in relation to any part of the claimant's claim, pursuant to rule 39 of the 2013 Employment Tribunals Rules of Procedure. By way of background, I refer to the written record of the preliminary hearing that took place before Employment Judge Dyal on 10 August 2017 in which this preliminary hearing to deal with preliminary issues was set up.

3. In the written record of that hearing, Judge Dyal set out the complaints the claimant is making and the issues arising in relation to those complaints in paragraphs 4 to 7. The claimant accepts that he did so accurately and comprehensively.

4. The law that I am dealing with concerns whether a claim has little reasonable prospects of success in accordance with rule 39, which states: "*Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in the claim or response has little reasonable prospects of success it may make an order requiring a party (referred to as the paying party) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*"

5. What does "*little reasonable prospects of success*" mean? The law in this area is not, perhaps, as clear as one might wish, but, broadly, it means little significant chance of winning on a particular issue at trial, which is a high threshold test. It is more than merely that the claimant will probably lose. I like to think of it as something like: the claimant could conceivably win, but it's very unlikely.

6. The claimant was dismissed because of her sickness absence record. There is no dispute that that was the reason for her dismissal. All of her complaints (which are complaints of unfair dismissal – so-called 'ordinary' unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996 – unfavourable treatment because of something arising in consequence of disability under section 15 of the Equality Act 2010 ("EQA"), and failure to comply with the duty to make reasonable adjustments pursuant to EQA sections 20 and 21) are essentially about dismissal. All of them boil down to an allegation that the respondent failed to comply with the duty to make reasonable adjustments by failing to take three steps set out in the written record of hearing on 10 August in paragraphs 6.c.i. to iii.

7. I think that the three types of complaint being brought will almost certainly stand and fall together. In relation to unfair dismissal, for the purposes of this preliminary hearing the claimant is not alleging any procedural defects or anything of that kind. The claimant's allegation is that the dismissal was unfair because the respondent failed to comply with the duty to make reasonable adjustments and it seems to me that if the claimant wins the reasonable adjustments claim, she will almost certainly also win the unfair dismissal claim. Similar considerations apply in relation to the section 15 claim. I think the respondent will show that the dismissal was a proportionate means of achieving a legitimate aim if it complied with the duty to make reasonable adjustments and will not show this if it failed to comply with that duty. Certainly, for the purposes of a preliminary hearing dealing with deposit orders, that's how the case seems to me and that is how I will treat it.

8. Accordingly, what I am focussing on is solely the three steps the claimant argues the respondent should have to have taken to comply with the duty to make reasonable adjustments.

9. The first of those steps is allowing the claimant to work part time. It's common ground that part time work was mentioned only in passing prior to dismissal and that the possibility of part time work was only really considered in connection with the claimant's appeal against dismissal. Initially, I was very much with the respondent on this point. Part time working would not have affected the claimant's level of sickness absence before dismissal, which was the thing that led to dismissal. However, upon analysis, what the claimant is really saying in this part of the case is that she should have been offered part time work as an alternative to dismissal and/or that she should have been reinstated part time on appeal. I cannot say with any certainty that had this adjustment been made, the claimant's attendance record would not have improved going forward. So whether this was a reasonable step for the respondent to have to take is an issue in relation to which I

am not satisfied that the claimant has little reasonable prospects on the material before me.

10. Respondent's counsel, Miss Smith, reminded me when making submissions on another of the proposed adjustments that any reasonable employer focuses, when dealing with an employee with a sickness absence problem, on the prospects of a return to regular attendance. Part time work was something that had not been tried previously in relation to the claimant. I can't say that the claimant has little reasonable prospects of persuading the tribunal at trial that the respondent should have given part time working a go.

11. The second proposed reasonable adjustment – number ii. – is notifying the claimant that she could, and allowing her to, work additional hours on good days (days when she was well) to offset against hours missed on sick days. I have to say I think the claimant is on shaky ground in relation to this part of her claim. I can see why the suggested adjustment she puts forward would be very unattractive to most employers. I accept she would probably lose on this part of her case. However, marginally, on balance, I am not satisfied that she has little reasonable prospects of success on this point. In any event, even if I were satisfied that she had little reasonable prospects of success on this narrow point, I don't think it would be appropriate for me to make a deposit order, given that I am permitting the reasonable adjustments claim generally to proceed and given that it is not in law incumbent on a claimant to come up with the adjustments at trial; instead it's for the tribunal to come up with them for itself.

12. The third proposed reasonable adjustment is allowing a period of 6 months rather than about 2 months to achieve the attendance target set in October 2016. This adjustment relates to the end of the respondent's attendance procedure where, effectively, the claimant was given one last chance – a period of 2 months – in which she had to achieve a certain level of attendance; I think it was 90% attendance over that 2 month period. She failed to do so and that led directly to her dismissal.

13. In relation to this part of the claimant's case, I repeat what I have just said in relation to the second proposed reasonable adjustment. This part of the claimant's case looks very weak for two reasons. First, given the lengthy process the respondent had already gone through at the point at which it gave her a final 2 months to improve her attendance, I think the claimant will struggle to persuade the Employment Tribunal at trial that giving her 6 months was a reasonable step for the respondent to have to take. Secondly, given the level of sickness absence within the 2 month period she was given, she may well have difficulties in persuading the Tribunal at trial that having 6 months instead of 2 to achieve a 90% attendance rate "*could well*" have made a difference. However, again on balance, I am not satisfied that the claimant has little reasonable prospects of success on these small parts of her case and for reasons already given, it would not be appropriate to make a deposit order anyway.

SENT TO THE PARTIES ON

28 November 2017

.

FOR THE TRIBUNAL OFFICE