



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Dynott

**Respondent:** KMS (UK) Limited

**Heard at: London Central (remotely by CVP)**

**On: 18 January 2022**

**Before: Employment Judge Heath**

## **Representation**

Claimant: Mr D Ibekwe (Trade Union representative)

Respondent: Ms G Duffy (Senior Litigation Consultant)

# JUDGMENT

1. All claims under the Equality Act 2010 (discrimination and victimisation) as set out in paragraphs 2.3.1 and 2.3.2 of the Particulars of Claim are dismissed on their withdrawal.
2. The following claims are not struck out in accordance with Rule 37 of the Employment Tribunals Rules of Procedure 2013 (“the Rules”), and no deposit is ordered in respect of the said claims under Rule 39 of the Rules:
  - i. The claim for unfair dismissal under regulation 7 Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”);
  - ii. The claim for “ordinary” unfair dismissal under section 98 Employment Rights Act 1996 (“ERA”);
  - iii. The claims under regulations 14 and 16 Working Time Regulations 1998 (“WTR”).

# REASONS

## Introduction

1. This was an Open Preliminary Hearing to consider the respondent's applications to strike out various of the claimants claims or in the alternative for deposit orders to be made in respect of these claims. The hearing of these applications was to be followed by a case management hearing.

## Procedure

2. The claimant did not attend the hearing, but was represented by Mr Ibekwe who told us he had her instructions on how to conduct the case. He told me that he was not her designated trade union representative, but was part of the trade union.

3. I have been provided with a claimant's bundle supplemented by a few documents provided by the respondent. I spent the first part of the hearing clarifying preliminary issues. Mr Ibekwe had considerable problems with his IT, and eventually the decision was made for him to telephone into the hearing rather than continue with very unstable video connection.

## The claims and applications

4. By an ET1 presented on 13 February 2021 the claimant brought claims of:-

- i. Unfair dismissal under regulation 7 Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE");
- ii. "Ordinary" unfair dismissal under section 98 Employment Rights Act 1996 ("ERA");
- iii. Claims under regulations 14 and 16 Working Time Regulations 1998 ("WTR").

5. While the claimant did not tick the discrimination box within her ET1, in the body of her Particulars of Claim, she made reference to what appeared to be claims of disability discrimination and harassment. Mr Ibekwe confirmed the start of the hearing that no claims of discrimination or victimisation set out in paragraphs 2.3.1 and 2.3.2 of the Particulars of Claim were being proceeded with. He was instructed to withdraw them, and I dismissed them upon their withdrawal.

6. By application, which does not bear a date on its face, the respondent applied under rule 37 of the Rules for an order striking out the claimant's unfair dismissal claims and the WTR claim, or in the alternative a deposit order under rule 39 of the Rules.

7. In summary the respondent asserted

- a. The claimant had applied and been granted voluntary redundancy;
- b. She had not been coerced and could not say she had been unfairly selected;

- c. There was no evidence that the redundancy procedure that led to her dismissal separated TUPE'd and non-TUPE'd staff
- d. She had been given the correct notice to take her annual leave which had been calculated correctly.

## **The law**

8. Rule 37 of the Rules gives the Tribunal power to all or part of the claim on various grounds, including under rule 37(1)(a) “*that it is scandalous or vexatious or has no reasonable prospect of success*”.

9. Rule 39 of the Rules gives the Tribunal power to order a party to pay a deposit as a condition of continuing to advance an allegation where that allegation has “*little reasonable prospect of success*”.

10. Both representatives acknowledged the body of case law that recognises the power to strike out as being a Draconian one. Additionally –

- a. Cases should not, as a general principle, be struck out when central facts are in dispute (*Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330).
- b. It is inappropriate for the tribunal to conduct “mini-trial” where there is conflicting evidence (*E D & F Man Liquid Products Ltd v Patell* [2003] EWCA Civ 472;
- c. The claimant’s case must be taken to its highest unless contradicted by plainly inconsistent documents (*Ukegheson v LB Haringey* [2005] ICR 1285);
- d. An unfair dismissal claim where there were factual issues to be decided should only be struck out in exceptional circumstances. Almost every decision in an unfair dismissal case is fact-sensitive (*Tayside Public Transport Co Ltd v Reilly* [2012] CSIH 46, *A v B* [2010] EWCA Civ 1378).

11. The purpose of a deposit order is not to make it difficult to access justice or to affect the strike out through the back door. The tribunal is to conduct a summary assessment of the claim and not conduct a mini-trial of the facts (*Hemdan v Ishmail* [2017] IRLR 228. The tribunal “*must have a proper basis for doubting the likelihood of the party been able to establish the facts essential to the claim or response*” (*Van Rensburg v Royal Borough of Kingston upon Thames* UKEAT/0095/07).

## **Conclusions**

### Reg. 7 TUPE unfair dismissal

12. The claimant’s claim is that after the relevant transfer she was dismissed and that the sole or principal reason for the dismissal was the transfer. The reason for dismissal is a contested issue between the parties. The claimant says the reason why she was dismissed was the transfer, the respondent says it was a dismissal for redundancy, voluntarily taken. Determining this claim will involve the resolution of disputed facts.

13. The respondent has pleaded, in the alternative, an economic, technical or organisational reason defence under reg 7(2) TUPE. If it establishes this then under reg 7(3) TUPE the tribunal will have to go on to consider whether the employer acted reasonably under section 98(4) ERA. Again, these issues involve disputed facts which need to be established by evidence at the full merits hearing. The claimant clearly put in issue the reason for dismissal, and the fact that she ostensibly took voluntary redundancy does not affect this. She says there was an agenda hidden behind the ostensible reason for dismissal. She may or may not be able to establish this, but it needs to be established by evidence at a full merits hearing.

Ordinary unfair dismissal

14. Very similar considerations apply to her ordinary unfair dismissal claim. She disputes the reason for dismissal and she says her dismissal was unfair. Her case is that facts discovered subsequent to the dismissal entirely undermine the reason advanced by the employer. Again, evidence needs to be heard to determine these issues.

15. In the circumstances, the respondent has failed to establish that there is no reasonable or even a little reasonable prospects of success.

WTR claim

16. The respondent drew my attention to a letter written by its director Mr Gates on 31 July 2020. In it, among other things, he set out the claimant's holiday entitlement to the end of her redundancy notice. On 31 October 2020 as being 22.25 days. He, on the face of it, gives notice to take "*these days as holiday in October 2020 as part of your notice period*".

17. There was some additional complexity in that the claimant was on furlough for all of this period. Is not taken to any of the detailed government guidance on taking holiday during furlough., And in the circumstances I was not satisfied that the respondent had shown that there was no or even little prospect of success.

**Overall conclusion**

18. In the circumstances, I do not strike out any of the claims nor do I order a deposit in respect of any of them.

Employment Judge **Heath**

18 January 2022\_\_\_\_\_

JUDGMENT & REASONS SENT TO THE PARTIES ON

19/01/2022.

FOR THE TRIBUNAL OFFICE