



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Lugo  
**Respondent:** A & L Restaurants Limited  
**Heard at:** East London Hearing Centre (by telephone)  
**On:** 10 June 2020  
**Before:** Employment Judge Moor

## Appearances

For the Claimant: in person, helped by Ms A Ali, friend  
For the Respondent: Miss S Bowen, counsel

# JUDGMENT

The claim is struck out.

# REASONS

1. In a series of letters the Tribunal gave the Claimant an opportunity to make representations or to request a hearing, as to why her claim should not be struck out because it has no reasonable prospect of success.
2. The Claimant wrote to the Tribunal on 14 May 2020 requesting a hearing.
3. The hearing today was a remote hearing (fully audio) because it was not reasonably practicable to hold it in person because of the prohibition on face to face hearings until at least the end of June 2020.
4. Normally, hearings to consider striking out the claim are in public. The Tribunal balanced the right to have a hearing in public with the right to have a claim heard within a reasonable time and decided that, in this case, the latter outweighed the former. The claim form was presented in September 2019 about a period of loss of pay about a year ago. The Claimant's rights to have her claim determined within a reasonable time were particularly important here, given that she may have an alternative claim in the County Court, with time limits running. If she did not get a determination in this claim in a reasonable time, her ability to consider whether to bring a claim in the County Court would have been more

limited. The parties did not object to a hearing by telephone and the issues were capable easily of being decided on the papers: no evidence being required.

5. The Claimant's first language is Spanish. I checked with her carefully whether she was fully able to represent herself today. She explained that she could speak English well enough and she had her friend, Ms Ali, with her to explain anything she had not understood. I explained that I would answer any questions she had and that she should tell me if she did not understand. She agreed. I explained how important it was that the Claimant was able to follow what was being said. I asked her whether she wished to continue and she confirmed that she was 'sure' that she wished to do so with the help of Ms Ali. I allowed Ms Ali to speak on the Claimant's behalf during the hearing and I gave them time to consult with each other. During the hearing, I tried to use simple language and explain what I was saying in different ways so that Miss Lugo understood. I answered Ms Ali's questions. I gave Miss Lugo time at several points to ask anything she wished. In particular, after explaining to her the limits of the Tribunal's power to hear harassment cases (that the harassment had to relate to a characteristic like sex or race), I gave her time in a 15 minute break to consider whether there was any more she wished to say about that.
6. Under Rule 37 the Tribunal may strike out a claim if it has no reasonable prospects of success. This does not mean if it is unlikely to win. I must consider that it has **no** prospect of success before I take the step of striking out a claim.
7. Before I considered the strike out question, I clarified with Miss Lugo what her claim was about.
  - a. Both parties agree she is still employed.
  - b. Miss Lugo clarified that she was claiming lost pay for the period of 3 months and 1 week that she was absent from work. She stated she was absent because she had been assaulted at work. She was frightened to go to work. She had been to her doctor who had asked her employer in a letter for an alternative workplace.
  - c. A sick certificate covered some but not all of the period to which her claim relates. Miss Lugo accepts that she was paid Statutory Sick Pay ('SSP') for the times she had a sick certificate. But SSP did not cover the whole period and, of course, SSP was a fraction of her normal salary.
  - d. She clarified, in answer to my question, that she was not claiming pay for the earlier period between October 2018 and about March 2019 when she had been promoted then demoted twice. That was background to her claim.
  - e. Although Miss Lugo had not stated on her claim form that she was making a harassment claim, the assault was the reason why she was making her pay claim. I therefore explained to Miss Lugo the limits of the Tribunal's power: that it could hear a claim about the assault if it was related to sex or race or another 'protected characteristic' under the Equality Act 2010 but not otherwise. Even after this explanation,

Miss Lugo did not contend the assault was related to a protected characteristic like sex or race.

- f. I asked whether her employer had said anything to her about her absence. She said not. She was therefore not contending that the employer had agreed that she could be absent or that it had agreed she would be paid for this absence. (In any event this would be a breach of contract claim and the Tribunal would have no power to hear such a claim because Miss Lugo is still employed.) I asked her whether it had been agreed that some of her absence was holiday: she said not.
  - g. Miss Lugo stated she did not have a written contract. She was not therefore contending that the contract allowed her to be absent with pay for the reasons she stated.
8. I have concluded, therefore, that the only claim Miss Lugo is bringing is a claim under section 13 of the Employment Rights Act 1996 of a deduction of wages.
  9. To succeed in her wages claim Miss Lugo would have to show that the wages she is claiming were properly payable. I have concluded that she has no prospect of being able to show this because:
    - a. she is not claiming that her contract or her employer allowed her to be absent on full pay after an assault at work;
    - b. she is not claiming that her contract allowed her full pay when off sick; and even if she were, in the absence of an express contractual term which she has told me does not exist, such a claim would have no reasonable prospect of success;
    - c. the usual employment bargain therefore applies: that an employee is paid for doing work and the Claimant has no prospects of being able to show that she should have been paid when absent without permission from her employer.
  10. I therefore strike out the whole of the claim. That means that Miss Lugo's claim is not allowed to continue.
  11. I explained to Miss Lugo that my decision did not mean she did not have any possible legal claim. I stated that I understood her argument was that had lost pay through no fault of her own and because of an assault at work. As EJ Crosfill explained in his letter of 29 May 2020, Miss Lugo's complaint might amount to a claim for loss arising out of personal injury. Or it might be a claim for harassment under the Harassment Act. It is the County Court that has the power to hear such claims, not the Employment Tribunal. I suggested to Miss Lugo that she could seek advice about this.

**Employment Judge Moor**  
**Date: 11 June 2020**