



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

X

Y

## OPEN PRELIMINARY HEARING

HELD AT London South

ON 26<sup>th</sup> April 2017

EMPLOYMENT JUDGE F SPENCER

### APPEARANCES

For the Claimant: In person,

For the Respondent: Mr Paulin, counsel

## JUDGMENT ON A PRELIMINARY HEARING

The Claimant had insufficient service to bring a complaint of unfair dismissal and that complaint is dismissed.

The Claimant's claim of disability discrimination is dismissed on withdrawal. As the claim has been withdrawn no deposit order is made.

The Claimant's claim of sexual harassment contrary to section 26 of the Equality Act 2010 will proceed.

## CASE MANAGEMENT ORDER

### Full merits hearing

1. The case is listed with the agreement of the parties for hearing of liability and remedy before a full tribunal for 3 days commencing at 10.00 a.m. on 11<sup>th</sup> October 2017. The evidence and submissions as to liability should be completed in the first 2 days with the third day being reserved for the Tribunal to consider the evidence and, unless reserved, give Judgment and, if appropriate, deal with remedy. The parties are expected to cooperate to ensure that the case can be

completed within the time allocated. No postponement of the hearing date will be granted unless there are exceptional and unforeseen circumstances.

The claim

2. The Claimant brings a complaint of sexual harassment arising out of a “strip search” she was required to undergo as particularised in her claim and in the further particulars she provided to the Tribunal and the Respondent. The Respondent accepts that the Claimant was required to undergo a “full search” but the details of what happened are disputed as is the claim for sexual harassment.

Schedule of loss

3. On or before 10<sup>th</sup> May 2017 the Claimant shall send to the Respondent and the Tribunal a schedule of loss setting out the amount claimed in these proceedings showing calculations where appropriate.

Disclosure of Documents

4. On or before 26<sup>th</sup> May 2017 the parties shall prepare and exchange a list of all documents which are or have been in their respective possession or power relating to the matters in issue in these proceedings, including all documents relevant to remedy.
5. On or before 2<sup>nd</sup> June 2017 the parties shall produce to each other the documents listed in their respective lists as have been requested by the other party and shall permit the other party to take copies of such documents. If preferred this part of this order may be complied with by supplying copies of such documents

Trial Bundles of Documents

6. The parties shall liaise to prepare the content of, and index to, a common bundle of copy documents for the tribunal hearing, primary responsibility for its preparation being with the Respondent. The bundle, which shall be indexed and paginated, shall contain a copy of each document both parties intend to use at the tribunal hearing. Double sided copying is encouraged.
7. No later than 16<sup>th</sup> June 2017 the Respondent shall supply one copy of the bundle to the Claimant. The Respondent shall bring five identical bundles of the copy documents to the Tribunal hearing, four of which will be for the use of the Tribunal and the witnesses.

Witness Statements

8. The parties shall prepare a written statement for each witness (including the Claimant) whom it is intended will be called to give

evidence on their behalf at the tribunal hearing. Each party shall ensure that there are six copies of each statement of their own witnesses available at the tribunal hearing and not contained in the trial bundle of documents.

9. Such witness statements shall:
  - 9.1 be typed in double spacing;
  - 9.2 contain the evidence-in-chief of such witnesses;
  - 9.3 be laid out in short consecutively numbered paragraphs;
  - 9.4 set out in chronological order, with dates, the facts which the witness can state;
  - 9.5 omit any matter not relevant to the issues in this case;
  - 9.6 identify the source of any information which the witness does not know first-hand;
  - 9.7 refer by page number in the bundle of documents to any document mentioned in the statement; and
  - 9.8 be signed.

#### Evidence without a Witness Statement

10. No evidence-in-chief may be given by a witness other than the evidence contained in the written statement of that witness without the permission of the tribunal. No witness may be called by a party to give evidence at the tribunal hearing other than a witness in respect of whom a written witness statement has been prepared and exchanged or with the permission of the tribunal.

#### Exchange of Witness Statements

11. On or before 13<sup>th</sup> September 2017 there shall be a simultaneous exchange of witness statements by each party providing to the other one copy of each witness statement for each of the witnesses that party intends to call to give evidence at the tribunal hearing.

## **REASONS**

1. This was a Preliminary Hearing listed by REJ Hildebrand to consider:
  - (1) Whether any or all of the Claimant's claims should be struck out under the provisions of rule 37 on the grounds that the claims have no reasonable prospect of success.
  - (2) Whether the Claimant's claim of unfair dismissal should be struck out on the grounds that the Claimant has insufficient qualifying service to bring such a claim.
  - (3) Whether the tribunal considers that any specific allegation or argument in the claim has little reasonable prospect of

success and whether to order the Claimant to pay a deposit as a condition of continuing to advance that allegation or argument.

- (4) Whether any of the Claimant's claims brought under the Equality Act 2010 had been brought after the end of the time limit set out in section 123.
2. In relation to the complaint of unfair dismissal, it is not disputed that the Claimant does not have 2 years' service. Section 108 of the Employment Rights Act 1996 provides that the right not to be unfairly dismissed does not apply to the dismissal of an employee unless she has been continuously employed for a period of not less than 2 years ending with the effective date of termination.
3. As the Claimant does not have two years' service and has not put forward any basis upon which one of the exceptions in section 108(3) would apply I find that the Tribunal has no jurisdiction to consider the complaint of unfair dismissal and this complaint is dismissed.
4. In relation to the complaint of disability discrimination the Claimant puts her case as one of indirect discrimination/failure to make reasonable adjustments. The Claimant says that she is disabled by reference to her dyslexia/dyspraxia. It is her case that the Respondent applied a PCP that she (i) had to lodge her appeal against dismissal within 5 days, and (ii) had to lodge her appeal without access to the transcripts of her disciplinary hearing. She also says that she did not in any event get notice of dismissal on 25<sup>th</sup> October as represented by the Respondent and did not get copies of the transcripts until 7<sup>th</sup> November. As a result she could not lodge her appeal in time and when she did lodge her appeal the Respondent refused to action it as it was out of time.
5. In relation to the claim of indirect discrimination, it was not clear how the requirement to lodge her appeal within 5 days and without access to the transcripts put those with dyslexia/dyspraxia at a particular disadvantage and how it put the Claimant at that same disadvantage. Insofar as the reasonable adjustments complaint is concerned it was not clear how these requirements put the Claimant at a substantial disadvantage in comparison to those who were not disabled. It appeared that what the Claimant was really complaining about was general unfairness and that these matters could not be said to have put her at a particular/substantial disadvantage by reference to her dyslexia/dyspraxia. Unfortunately as the Claimant did not have the requisite service to bring a complaint of unfair dismissal, a complaint of general unfairness could not be pursued.
6. I considered that conceptually the Claimant's claim had little reasonable prospect of success. Moreover there were a number of factual issues in dispute. While it was not for me to determine those today I noted that although the Claimant says she did not get written

decision to dismiss her until early November (so she could not lodge her appeal earlier) contemporaneous emails indicate that she did receive the outcome letter on 25<sup>th</sup> October 2016 (see in particular the email timed at 13.22 on 25<sup>th</sup> October 2016 from Mel Larkin) and also that she was told that she simply needed to notify the Respondent that she intended to appeal within the timeframe and further particulars could be submitted later. Equally, although the Claimant says that she was not able to appeal without access, and time, to work through the transcripts, she did in fact submit a lengthy complaint/grievance on 3<sup>rd</sup> November before she had received the transcripts. Although these were factual matters that needed to be determined at the hearing I considered that the additional evidential hurdles in the Claimant's way which (while of less importance to my decision than the conceptual hurdles above) would make it difficult for her to establish a claim of disability discrimination.

7. In relation to the Claimant's claim of sexual harassment this is really a matter which can only sensibly be determined after hearing all the evidence. It is not appropriate for a strikeout nor can I sensibly say that it has little reasonable prospect of success without assessing the evidence. That case will therefore proceed. It is also appropriate that jurisdictional time issues shall be considered by the Tribunal which hears the full merits of the claim
8. Having given my decision as to the above matters and explained the deposit process to the Claimant, the Claimant indicated that she did not need time to consider her position or her options and asked if she could withdraw her complaint of disability discrimination immediately. Having ascertained that the Claimant was sure I acceded to that request and dismiss that claim on withdrawal. Consequently no deposit order will be made.

Employment Judge Frances Spencer

26<sup>th</sup> April 2017