EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100163/17

Held in Glasgow on 16 August 2017

Employment Judge: Robert Gall

Mrs Aleksandra Cielesz	**Claimant** **Represented by:** **Mr Mensah - Counsel**
Motherwell & District Woman's Aid	**Respondents** **Represented by:** **Ms L MacSporran - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. Written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the Hearing. It is provided for the convenience of parties.

The Judgment of the Tribunal is that:-

(1) The claim of indirect sex discrimination brought under Section 19 of the Equality Act 2010 is withdrawn and is dismissed in terms of Rule 52.

(2) The application to amend the claim by deletion in the final paragraph of the statement of claim of "*sex discrimination*" and the substitution of

"*discrimination on the grounds of pregnancy and maternity pursuant to Section 18(2) of the Equality Act 2010*" is allowed.

(3) The application by the respondents for a strike out order in terms of Rule 37 is refused.

(4) The application by the respondents for a deposit order in terms of Rule 39 is refused.

The case will be set down for a one hour telephone case management preliminary Hearing to agree Hearing dates and to make relative arrangements in relation to documents, witnesses etc for the Hearing.

REASONS

1. The claimant was pregnant at the time when the acts said to provide the grounds of her claim are said to have occurred.

2. The claim as pled is one of direct discrimination and of indirect discrimination.

3. The act of direct discrimination is said to have been dismissal. The legal basis set out in the pleadings, the Agenda return and the further and better particulars is Section 13 of the Equality Act 2010 ("*Eqa*"), the protected characteristic being sex.

4. The respondents say that the claim, in circumstances where the claimant was pregnant, requires to be brought under Section 18 of Eqa. It has not been. It is not competent to bring such a claim, they argue, under Section 13 of Eqa. They therefore seek strike out of that claim on the basis that it has no reasonable prospect of success.

5. The respondents also argue that if an amendment was to be attempted by the claimant in order to advance the claim under Section 18 of Eqa, any such application should be refused. They point to the time taken to get to the stage of any such amendment being proposed, the expense which has been caused to the respondents and the opportunities given to the claimant to set out her position, in response to which she has always said that sex discrimination is the basis of her claim. They say that they are in a difficult and restricted financial position and that this is of relevance in relation to permission to amend.

6. For the claimant, it is said that it is clear to the respondents what the claim is. It is that the claimant had been dismissed and that the dismissal was because of her pregnancy. The respondents answered the claim, it is said, with that in mind. If there was a criticism then that was in reality of the label which the claimant had applied to the claim. There was, the claimant said, no need for amendment as it was clear what her case was. If the Tribunal was of the view that an amendment was required, the claimant would seek to amend. There would be prejudice to her if she was not permitted to amend. There would be no significant prejudice on the other hand to the respondents if she was permitted to amend. Although Mr Mensah said that he did not endorse this, there was the possibility of a wasted costs order if that was ultimately considered appropriate.

7. The amendment proposed on behalf of the claimant was that in the final paragraph of the statement of claim sex discrimination should be deleted with the words “discrimination on the grounds of pregnancy and maternity pursuant to Section 18(2) of the Equality Act 2010” being substituted for that.

8. Ms MacSporran confirmed that if the Tribunal regarded amendment as being appropriate and was prepared to allow an amendment, there was no objection to the amendment proposed.

9. There was a claim of indirect discrimination, the protected characteristic being sex, advanced by the claimant.

10. The acts said to constitute indirect discrimination were all related to the pregnancy of the claimant.

11. The respondents highlighted that under Section 19 of Eqa pregnancy was not a protected characteristic.

12. The claimant accepted that the claim of indirect discrimination was ill founded and would not be pursued. I canvassed this area with Mr Mensah to ensure that there was clarity. He confirmed that the claim was withdrawn. In those circumstances it is therefore dismissed.

13. The respondents also argued in relation to direct discrimination that the claimant had not set out the basis on which she said that dismissal was because of her pregnancy. The claimant said that the events narrated were relevant. Those were that the claimant had taken exception to cleaning a particular property and to cleaning in general given her pregnancy. She had set out the reaction of the respondents to this. That supported her view that they were unhappy with her pregnancy and that this had been the reason for her dismissal.

14. For the purposes of the respondents` application, the claimant`s case is taken as pled. Clearly there are factual disputes between the parties as to whether events happened as well as to the reasons for dismissal.

15. An application for strike out of a case, especially one involving allegations of discrimination, is granted, in general terms, only in exceptional cases.

16. Both parties accepted that this was the effect of case law. They also accepted that strike out is a draconian step.

17. Clearly strike out is possible, notwithstanding the fact that it is rarely appropriate.

18. I deal in the remainder of this Judgment with the claim which is "live" in this Judgment, the claim of direct discrimination.

19. The respondents take a valid and in my view sound position as their starting point and indeed as their fundamental point.

20. They say that the claim has been brought under the wrong section of Eqa. I have sympathy with their position, especially given the various opportunities given to clarify the claim and the repetition of the ground of claim as being sex discrimination.

21. Had the claimant "*stood firm*" and said that her pleadings were sufficient as they were to comprise a legally sound claim, I would have been sympathetic to the strike out application.

22. The claimant, however, sought to amend if I tended to that view.

23. The amendment proposed involved retaining the pleadings as they stood, save for deletion of the reference to sex discrimination. This was to be replaced by a reference to pregnancy and maternity discrimination under Section 18 of Eqa.

24. As recorded above, allowing any amendment was something opposed by the respondents.

25. I considered that it was appropriate to allow the amendment in exercise of my discretion in such a matter.

26. I had regard to the nature of the amendment, its timing and, in general, to the prejudice if the amendment was allowed on the one hand or if it was

disallowed on the other. I had regard to the overriding objective. I considered all the points made by each party in this area.

27. If the claim of pregnancy and maternity discrimination was brought now, it would be out of time. What is sought, however, is not, in my view, to advance a fresh or new claim. Rather it is to relabel a claim already brought. That is apparent from the brief and focused amendment proposed.

28. I recognised that if the amendment is allowed there will be prejudice to the respondents in that they will face a relevant claim. They have been "*kept waiting*" to understand fully the claim and the basis of it. It cannot, however, be said in my view that they, putting it colloquially, did not see this coming. The difficulty has been caused, it appears by the claimant`s representative at the time referring to the wrong section and to the wrong protected characteristic.

29. Whilst I could take the view that I should refuse the amendment application and potentially strike out the claim, that penalises the claimant and prejudices her significantly. It might be, as the respondents suggested, that she has a remedy in those circumstances against her representative. I considered that as part of my assessment.

30. I also considered the possibility which exists as to a wasted costs order being made against the claimant`s representative in the earlier stages. For the avoidance of doubt that representative is not Mr Mensah. That possibility may be something to be kept in mind.

31. Balancing all the relevant factors, however, I decided to exercise my discretion and to allow the amendment proposed.

32. The claim is therefore focused. The claimant says that she was dismissed and that this constituted unfavourable treatment which was because of her pregnancy. She points to what she says were the responses of the

respondents when she raised the pregnancy in relation to being asked to carry out tasks as supporting her dismissal being because of her pregnancy.

33. Whilst that position is disputed, I do not see that it can be said that there is no reasonable prospect of success in the amended case as brought by the claimant, looking to her claim as pled and on the basis, for this purpose, that she proves the facts alleged.

34. Similarly, I do not see that it can be said, on the case as now pled, that there is little reasonable prospect of success.

35. I heard evidence as to the claimant`s ability to pay. That would have been of relevance if I was to make a deposit order.

36. For the reasons given, however, I do not see that the high test for strike out and the slightly lower test for a deposit order have been met in relation to the claimant`s case as now pled. The applications are therefore refused.

37. A one hour case management Preliminary Hearing to be conducted by telephone will be set down to discuss the Hearing dates and arrangements.

Employment Judge: Robert Gall
Date of Judgment: 17 August 2017
Entered in register: 18 August 2017
and copied to parties