Case Number: 3347067/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Pruzhanskaya	v	**International Trade & Exhibitors (JV) Ltd**

PRELIMINARY HEARING

Heard at: **Watford** **On: 30 August 2017**

Before: Employment Judge Smail

Appearances:

For the Claimant: **In person**
For the Respondents: **Mr M Sheridan, Counsel**

RESERVED PRELIMINARY HEARING JUDGMENT

1. Unless the Claimant makes disclosure by list and copy documents to the Respondent within 21 days of this Judgment, her claims shall stand dismissed without further order. The following orders are conditional upon compliance with this order.

2. The full merits hearing in this matter will be heard over 5 days before a full panel between 5 – 9 March 2018 at the Employment Tribunals in Watford.

3. There will be a 30 minute telephone preliminary hearing at 9.30am on 22 February 2018 to check compliance with orders and to timetable the full merits hearing.

4. The order refusing amendments dated 27 June 2017 is varied as follows:-

   (a) The amendments to paragraphs 47, 92, 96.2 to 96.5, 96.6 to 96.10 and 96.11 of the Particulars of Claim contained in the application dated 24 May 2017 are allowed;

(b) There is permission to amend the claim to add a claim of breach of contract for failure to pay commission in October 2015 in the sum of £2,700 only.

5. Save as aforesaid, the order refusing amendments is confirmed.

6. The Claimant's applications for additional information and for written answers in respect of questions dated 3 July 2017 are refused.

7. The Claimant's application for specific disclosure dated 18 July 2017 is refused.

8. A revised list of issues reflecting the existing issues and the amendments permitted above will be agreed by 24 November 2017. A copy will be filed with the Tribunal by the Respondent by 30 November 2017.

9. The Respondent will prepare a bundle of documents by 15 December 2017 and serve a copy by then on the Claimant. 5 copies of the bundle are to be brought by the Respondent on the morning of the Full Merits Hearing for use by the Tribunal

10. Witness statements will be exchanged on or before 19 January 2018. For the avoidance of doubt, the Claimant must prepare a witness statement for herself and any witness she intends to call.

11. The Claimant will serve a revised Schedule of Loss on the Respondent by 9 February 2018.

REASONS

1. This preliminary hearing concerns itself with four matters:

   1.1 The Claimant's application for a reconsideration of the Tribunal's refusal of her amendment application dated 24 May 2017;

   1.2 The Claimant's request for additional information dated 7 July 2017;

   1.3 The Claimant's application for specific disclosure dated 26 July 2017;

   1.4 The Respondent's application for an Unless Order in respect of the Claimant's failure to comply with directions.

2. It is common ground that the final hearing listed for 11-14 September 2017 has to be vacated because the case is not ready to proceed.

3. The background is that the Claimant was employed as a senior sales executive between 20 June 2007 and 31 May 2016. She was dismissed ostensibly for redundancy. On 25 October 2016 the Claimant presented a claim form

complaining of unfair dismissal and maternity/pregnancy/sex discrimination. There was also reference to having no proper particulars of employment.

4. The first preliminary hearing came before me on 11 January 2017. At that point the Claimant was represented by a solicitor, Ms Ayesha Farah of Nucleus Legal Advice Centre. The issues were comprehensively narrowed at that hearing and were summarised the Claimant's case as follows:

> "Direct discrimination on the grounds of pregnancy/maternity/sex
>
> 1. In March 2015 upon return from maternity leave the Claimant was placed in a role which was not her previous role or a role that had more favourable terms, in breach of her legitimate expectation as someone returning from maternity leave. In particular, agent sales were taken away from the Claimant's responsibilities which meant a 75% reduction in sales revenue than previously and she had no marketing support. Those factors made it impossible for her to achieve satisfactory sales revenue.
>
> 2. As a consequence thereof she was dismissed for redundancy in 2016, the said dismissal thereby being tarnished by the discrimination that first occurred in March 2015 as aforesaid.
>
> General unfair dismissal
>
> 3. The Claimant alleges she was unfairly selected for redundancy. The Claimant relies upon two arguments in particular. First the CRM was not weighted against targets (the Claimant was compared to individuals whose sales opportunities were two to three times higher than the Claimant). Secondly the criteria adopted were too subjective.
>
> 4. The Claimant is seeking reinstatement."

5. By letter dated 24 May 2017 the Claimant applied to amend her particulars of claim and so expand those issues. The introduction to her application records the Claimant as saying that her previous solicitor had proved incompetent on several occasions, the original pleadings were not formulated clearly and accurately and she misadvised the Claimant that she could not use any document for support before a cut-off period of March 2015. Further, she claims that Ms Farah did not inform the Claimant of without prejudice discussions held with the Respondent's representatives. Accordingly, the Claimant withdrew her instructions to Ms Farah on 30 March 2017. She wanted to make amendments so that the Tribunal could see the whole picture of what had happened. The amendments were proposed under five headings:

   5.1 Changes to paragraph 47 as the details were inaccurate;
   5.2 Changes to paragraph 92 as the details were inaccurate;
   5.3 Adding detailed particulars to the maternity discrimination claim;
   5.4 Adding a whistleblowing claim; and
   5.5 Adding a contractual breach claim.

6. The application came before me on paper. I refused it by letter dated 27 June 2017 on the following grounds:

> "The amendments would add entirely new and significant claims, all of which are now out of time. It was reasonably practicable to bring them in time. It is not just and equitable to extend time."

7. By letter dated 9 July 2017 the Claimant applied for a reconsideration of this decision. She made the fair point that not all five of her applications had received individual consideration in terms of the decision, and suggested that should happen making a series of points in respect of the five headings. The Tribunal was receiving extensive correspondence in respect of this case. Accordingly on 9 August 2017 I ordered that a reconsideration/preliminary hearing for case management take place on 30 August 2017.

8. Mr Sheridan, on behalf of the Respondent, has submitted I should not even consider this application. The amendment application was rightly rejected by me he submits in the decision on the papers. He cites a number of authorities including Serco Ltd v Wells [2016] ICR 768 EAT and a reference to the judgment of Lord Justice Elias in Ministry of Justice v Burton, Court of Appeal, [2016] ICR 1128 to the effect that there is an importance of finality. The refusal to grant an amendment was not a judgment but a case management order. There is implied a power to review as though it were a judgment but should only be exercised where it is necessary in the interests of justice. In this case he submitted it was not in the interests of justice to review the decision. The Claimant had been represented by a solicitor when the original particulars of claim were drafted. The Claimant was present when her solicitor represented her at the first preliminary hearing. He submits there had been ample opportunity for the Claimant to get her case in order. He suggested that I could only interfere with my earlier order if there had been a material change of circumstances or a material omission or mis-statement or some other substantial reason.

9. I have considered Mr Sheridan's submission. In my judgment it is open to me to review my earlier decision refusing an amendment. That decision was taken without hearing any oral submissions. There is force in the Claimant's point that the decision did not reason out the refusal to grant the amendment under each of the five heads of application. Indeed, I am of the view that I fell into error by making the decision in a short summary fashion without reasoning under each head of application. Accordingly, I will re-visit my decision on the amendment.

10. The Claimant wishes to amend paragraph 47 of the claim form as follows:

> "47. On 20 May 2015 Leila Isakova, the person reporting to the Claimant, resigned. In June 2015 it was confirmed that Ms Isakova's position was made redundant in the London office and opened in the Kiev office with direct reporting to Lyudmila Denisyuk. Therefore, the Claimant now had no-one that was reporting to her and that was not what was offered to the Claimant in March 2015 and was detrimental to the Claimant's career development. London and opened in Kiev office with direct reporting to Lyudmila Denisyuk"

11. I allow this amendment. It adds detail which may be relevant to the Claimant's case. It in no way prejudices the Respondent.

12. The Claimant wishes to add the following paragraph at paragraph 92:

> "The Claimant will argue that she was a subject of continuing acts of maternity discrimination taking place from the time she informed the Respondent about her pregnancy in September 2013 to her dismissal in May 2016."

13. I allow this amendment. It is to the effect that the existing issues are linked by way of a continuing act of maternity discrimination. That argument has, in my judgment, always been understood.

14. The next application is a series of paragraphs: paragraph 96.1 to 96.11, said to be particulars of maternity discrimination. In paragraph 96.1 the Claimant wishes to contend that she missed out on a promotion at the end of April 2015. She says she was promised a prospect to become healthcare and beauty portfolio director during a telephone conference on 18 March 2015. She was not informed about the position being available and did not have a chance to apply and be considered for the position before Lyudmila Denisyuk's appointment. I reject this amendment. This seems to me to add a material new allegation which could have been made before and which if allowed to proceed could cause genuine evidential prejudice to the Respondent.

15. I allow the amendments at 96.2 to 96.5. These are particulars of the claims identified at the preliminary hearing on 11 January 2017.

16. Paragraphs 96.6 to 96.10 of the proposed amended particulars of claim relate to the Claimant's contention that she was unable to earn commission on top of a basic salary between March 2015 and her dismissal which was different to her treatment before her maternity leave. It seems to me that this allegation is closely related to the existing allegation to the effect that agent sales were taken away from her responsibility which meant a 75% reduction in sales revenue than previously. That, together with no marketing support, made it impossible for her to achieve a satisfactory sales revenue, she argues. It seems to me the issue of commission is sufficiently closely linked for this amendment to be made with no evidential prejudice to the Respondent.

17. At paragraph 96.11 the Claimant pleads that within two months of the last incident of maternity discrimination taking place on 14 March 2016, she was announced to be at risk of redundancy. She was dismissed on 31 May 2016, less than three months since the incident. She alleges this as a particular of maternity discrimination. That claim is already plainly in the list of issues and I allow 96.11.

18. At paragraphs 98.1 to 98.16 of the proposed amendment, the Claimant wishes to argue that she was dismissed for having raised matters with directors about financial irregularities, questionable business practices, all of which led to the company's bad financial performance. The Claimant submitted that she had referred to matters of whistle blowing in the first particulars of claim served. At paragraph 40 she mentioned that at the end of April 2015 Mr Read had commented that it had taken him a lot of time to deal with questions the Claimant had raised regarding the contracting system and he needed someone more experienced. At paragraph 52 she said on 8 October 2015 the Claimant had raised concerns regarding incompetent management and lack of communication in the division with Russell Taylor, the CEO; however, he referred the Claimant back to Mr Read. At paragraph 56 the Claimant had mentioned that on 19

January 2016 she heard from Richard Wightman, the London sales director, in response to her email regarding her issues with marketing support. He informed her that she could use the marketing materials of the Malaysian office while there were delays with hiring a marketing specialist for beauty events. This was not something that Mr Read, nor any of the people at the Claimant's office, had told her. At paragraph 59 she stated that on 8 March 2016 the Claimant had raised concerns about the professional competence of Mr Read and Ms Denisyuk with the chief executive officer, the HR director and the interim financial manager. The matter was, she said, ignored.

19. In my judgment, none of those matters amount to an allegation of a qualifying disclosure within s.43B of the Employment Rights Act 1996. By sub-section (1) of that section a qualifying disclosure "means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following: a criminal offence; a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; a miscarriage of justice has occurred; that the health or safety of any individual has been endangered; that the environment has been or is likely to be damaged; or the deliberate concealment of any of those matters.

20. Accordingly, I refuse this amendment. It amounts to a significantly changed case and adds a substantial new issue which plainly is brought considerably out of time. I accept that the Respondent would be prejudiced in having to deal with this allegation at this stage having collated its disclosure in respect of the matters identified at the January 2017 preliminary hearing. I exercise my discretion not to make this amendment.

21. At paragraphs 99.1 to 99.8 the Claimant wishes to plead a breach of contract by failure to exercise discretionary powers on commission payments. Plainly if allowed this would have to be limited to a maximum of £25,000. However, I note that in January 2017 a schedule of loss was served by the Claimant on the Respondent in which she claims by way of loss of commission from 24 March 2015 to 31 May 2016 30% commission of gross yearly salary in the sum of £10,348.00.

22. There were references to the issue of commission in the original claim form. In particular at paragraph 42 she says on 8 May 2015 the Claimant had a meeting with Ms Jones and Mr Read. The Claimant asked Ms Jones to email her job description and duties for her current position and her commission scheme. Ms Jones said Mr Read would do this but he never did apparently. At paragraph 45 she says on 14 May 2015 the Claimant asked again for her commission sheet and list of responsibilities which again were not sent. At paragraph 48 she says that on 2 July 2015 she again asked for her commission sheet. At paragraph 49 she says she was never given her commission sheet for the financial year 2014 to 2015 but other people had theirs. As a result, she lost about £2,700 for commission and individual objective bonus. At paragraph 50 on 22 July 2015 the Claimant alleged that she requested her targets for the financial year 2015-2016. The Claimant was told that they would be sent later as another colleague had not approved it yet. The Claimant requested a sales plan and her commission sheet on 24 November 2015 with a follow up email on 1 December 2015 and both emails she says were ignored. At paragraph 55 she says that on 13 January

2016 she saw her targets for the first time. These were unrealistic and needed to be reconsidered as though almost three times higher than previous years she says. At paragraph 57 she says that on 28 January 2016 the Claimant was finally sent her commission sheet by Mr Read. The Claimant emailed Mr Read to tell him that she considered the commission scheme unfair as he planned an increase of 300% for the Claimant which was a stark contrast to the usual 10 to 15%. The Claimant also noted, she says, that 30% of her commission depended on the performance of other people of which she had no control. The Claimant did not receive a reply to her email she says until 14 March 2016 when Mr Read reconsidered her sales targets to 43,123 euros.

23. Accordingly, there are multiple references in the original claim form to the issue of commission. The Claimant wishes to plead that according to paragraph 5.2 of her employment contract the Claimant was entitled at the company's discretion to bonus payments or commission payments in addition to her salary. Indeed since the beginning of her employment until March 2015 the Claimant was always paid either commission or a bonus every year. However, she submits for the last 14 months of her employment from March 2015 to her dismissal in May 2016 the Respondent acted in bad faith, irrationally and perversely and did not exercise discretion to make commission payments.

24. In the original claim, there is clear reference to the Claimant alleging entitlement to £2,700 unpaid commission. That is for the position up to 18 March 2015 as I understand it. It was payable in October 2015. I allow that claim as a breach of contract for that period limited to £2,700. That was plainly before the parties in the original claim form.

25. The desired new claim to allege perverse exercise of discretion in not paying commission up to 20 May 2016 is in my judgment a new claim which would involve a considerable amount of new evidence based on whether it was appropriate to exercise discretion to pay commission for the period in question. Indeed, I understood it to be the Claimant's primary case that because agent sales were taken away from her which meant a 75% reduction in sales revenue it was impossible for her to achieve satisfactory sales revenue. It may be therefore that the amount of loss of commission flows if established as compensation for discrimination. It is a different argument, however, to say that the commission decision should have been exercised on the performance she did achieve under the commission rules. That seems to me to be a new argument and one which would prejudice the Respondent at this stage if it had to meet it. It would add a considerable amount of evidence and time before the Tribunal.

26. Accordingly, I reject the breach of contract claim for commission save for the £2,700 claim said to be payable in October 2015. That matter was in the original claim form and would not prejudice the Respondent sufficiently at this stage for me to refuse the amendment.

Request for additional information

27. The Claimant had served on the Respondent two requests dated 3 July 2017 for additional information and for written answers in respect of questions. The Claimant has to date refused to make disclosure. Her position has been that until

the issues have been finalized, disclosure should not be made. In my judgment there needs to be disclosure in accordance with the orders of the Tribunal. Should the issues change then the duty of disclosure is a continuing one and further documents may have to be disclosed in due course. Order 2.1 of the orders made at the preliminary hearing on 11 January 2017 was to the effect that the parties were ordered to give mutual disclosure of documents relevant to the issues identified in the case by list and copy so as to arrive on or before 31 March 2017. The Respondent has intimated its readiness to make disclosure and indeed has offered to make disclosure in advance of the Claimant. The Claimant has refused. The Claimant has applied to postpone disclosure. That seems to me misconceived. Disclosure needs to be made as soon as possible.

28. Whether then there is a need for additional information and written questions will arise from that disclosure. Of course, where the additional information or written answers are likely to be covered in witness statements that, again, would be a reason for not making separate orders. Accordingly, the applications for additional information and answers to written questions are, in my judgment, premature at this stage. At the very least, disclosure has to be made first. The Claimant, if she has genuine questions which are unlikely to be dealt with in witness statements may make further application at that point. The governing principle here is not to generate unnecessary paperwork.

29. I do order, however, in respect of disclosure, that if the Respondent is claiming that documents are covered by privilege, they are to identify with some particularity the documents said to be privileged and to set out the nature of privilege and explain its basis if they are resisting disclosure in that regard.

Application for specific disclosure

30. This is dated 18 July 2017. It relates to disclosure relating to the redundancy exercise. Again, the application is premature. The Claimant should await the making of disclosure by the Respondent.

Respondent's application for an unless order

31. I am satisfied that the Claimant has not complied with her obligation to make disclosure. Accordingly, I make the unless order above in respect of her obligation to make disclosure. The original date for disclosure was 31 March 2017. On 24 April 2017, the Tribunal granted the Claimant's extension for a deadline to 10 May 2017. That date had agreed to be postponed to 26 May 2017 between the parties. The deadline for disclosure was revised to 14 July 2017 by Tribunal order and the Claimant's failure to comply with that prompted the Respondent's application for an unless order. The delays in making disclosure have hindered the advancement of the case and have made today unnecessarily complicated.

The Claimant's concerns about the relationship between her solicitor, ACAS and the Respondent's representation

32. The Claimant has on numerous occasions today suggested that ACAS and her solicitor are "partial" by which she means in some sort of corrupt alliance against her. She deliberately uses the word "partial". It means more than negligent in the case of her solicitor, she tells me. She has asked me to make disclosure orders against ACAS in respect of documents used by them in the course of conciliation. I have refused to do that on the basis that I am not to get involved in settlement negotiations. I have also expressed my view to the Claimant that she could usefully consult a solicitor as to first, the likelihood of there being such collusion; and secondly, proving it.

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Employment Judge Smail

17 October 2017

Sent to the parties on:

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For the Tribunal:

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