Case Number: 2302770/2017

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss E Weinberg

- and –

Arjuna Seth Shoes Limited

PRELIMINARY HEARING

HELD AT **London South** **ON 16 July 2018**

EMPLOYMENT JUDGE PHILLIPS

Appearances
For Claimant: **Mr K Limpert, Representative**
For Respondent: **Mr T Russell, Solicitor**

JUDGMENT

1. *The Claimant's claim for unfair dismissal is rejected as the ET has no jurisdiction to hear it;*
2. *The Respondent's application to strike out and / or for a deposit order in respect of the remaining elements of the Claimant's claim was rejected;*
3. *The Tribunal is minded to strike out the Respondent's contractual counterclaim.*

REASONS

1. The Respondent makes luxury designer ladies shoes. The Claimant started work with the Respondent on 16 November 2015 as the PR and Community Manager of the Respondent, with responsibilities for public relations and running the Respondent's website, including its online and social media presence. She was dismissed in July 2017, (the effective date of termination is in dispute). The Respondent says the dismissal was for redundancy. Mr Russell said the whole workforce was made redundant at this time. The Claimant, by her ET1, presented on 6 October 2017, sought to bring claims of unfair dismissal and

redundancy payment claims; notice and unpaid holiday claims; and sexual harassment and victimisation claims. The Respondent denies all the Claimant's claims in their entirety.

Unfair dismissal and redundancy pay claims

2. The Redundancy pay claim was withdrawn by the Claimant's representative on her behalf Shirley before this hearing, on the basis it was included in the ET1 in error. Therefore this claim is struck out.

3. The Claimant does not have the requisite two years continuous service to bring a "normal" unfair dismissal claim, therefore the Employment Tribunal does not have the jurisdiction to hear this claim and it is struck out.

Correct Respondents

4. The Claimant had issued her ET1 against the Respondent company and its owner/ managing director Ms Seth (as the Second Respondent) and her father Guru Dev Seth (as the Third Respondent). Given the nature of the allegations, none of which were personally directed against either of those two individuals, in my judgment the correct Respondent was the corporate Respondent and the claims against the named individual Second and Third Respondents are dismissed.

Deposit order and / or strike out sought by the Respondent

5. The Respondent sought by letter dated 29th June 2018 and as further advanced by Mr Russell in writing and orally at the hearing, to strike out the remaining elements of the Claimant's ET1 and / or for a deposit order under Rules 37 and / or 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

6. Rule 37 of the Rules of Procedure deals with striking out and provides, in so far as relevant

> 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

7. The Respondent says all the Claimant's claims are opportunistic and have no reasonable prospect of success.

8. Rule 39 deals with deposit orders and provides

> 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order— (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

9. In both cases, the test I am looking at relates to prospects of success. For the Rule 37 ground (1) (a) it is that all or part of a claim … has no reasonable prospect of success and for Rule 39, the test is whether any specific allegation or argument in a claim has little reasonable prospect of success. There is a nuanced difference between these two tests, although both are to be exercised at the Tribunal's discretion. The EAT in *Hemdan v Ishmail,* 10 November 2016, UKEAT/0021/16, (which although dealing primarily with the issue of the ability of a Claimant to comply with a deposit order, also helpfully sets out the background and purpose behind the making of such orders), stated that the Rule 39 test is less rigorous than the Rule 37 test, but that there must be a proper basis for doubting the likelihood that a party can establish the facts essential to the claim. Deposit orders have to be made recognising that the facts have not yet been found but reaching a provisional view as to the credibility of the assertions being put forward.

10. The Respondent in its submissions says the Claimant's claims have little or no prospect of success. It makes a number of points in support of its application, which are briefly summarised below.

11. Mr Russell says there has been no particularising as to why the sums paid by the Respondent on termination are said to be incorrect. With regard to the sex discrimination claim, Mr Russell points out that this is made in respect of an American gentleman, Mr E, who was not an employee, who says the meeting at which the alleged unwarranted advances were made was not in the course of employment and denies in any event the allegations. Mr Russell points to a statement to this effect from Mr E and to the fact there was a proper grievance hearing at which this complaint was dealt with and rejected. He points out the law with regard to SS 26,109, 110 of the Equality Act in so far as the Respondent could be liable for the acts of Mr E is quite specific. Mr Russell submits that there is nothing to support a claim of victimisation based on the grievance, as it was properly considered, as was an appeal. Further, he says there was a genuine redundancy taking place at this time, and the Claimant was in the same position as all other staff, so there was no causal connection between her dismissal and the grievance in any event.

Conclusion

12. I noted that the Employment Tribunal had previously considered an application by the Respondent's previous legal representatives to strike out the claim and / or for a deposit order, which had been rejected by EJ Balogun on 25 April. However, it appeared to me that Mr Russell's application was put on a different and more substantive basis and I therefore proceeded to consider it.

13. I was not satisfied on the basis of what was before me, in terms of the ET1, the ET3 and the additional information provided in writing and orally by Mr Limpert and Mr Russell, that the remaining aspects of the Claimant's claim (once the unfair dismissal, redundancy pay and correct Respondents issues had been dealt with) or any parts of them could be said, at this stage, to have either no reasonable prospect of success or little reasonable prospect of success. While it is correct that the Claimant has not provided any details as to why she disputes the amounts paid to her when her employment was terminated, that is a matter that can be easily dealt with by ordering her to provide a properly itemized Schedule of Loss. Clearly if the Claimant is unable to explain why these figures are wrong, she should withdraw those claims or they will be struck out.

14. It is correct that the Respondent has evidence that Mr E was not an employee, but I was not convinced at this stage that either sides' claims or assertions were more or less likely to succeed. Certainly I was not persuaded of the likelihood that the Claimant could not establish the facts essential to her claim. Both parties made a number of disputed factual assertions. These are matters that can only be determined by the Tribunal considering the relevant documentation relied upon by the parties, and hearing and testing the evidence of both sides by way of questioning. That can only happen at the full merits hearing, after disclosure and witness statements have been provided. I was therefore not in a position to take

a provisional view either way as to the credibility of the assertions being put forward. That being the case, I saw no basis on which to strike out the Claimant's ET1 Claim Form or order any sort of deposit order.

The Respondent's contractual counterclaim

15. The Respondent brings a counterclaim for £25,000 under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, on the basis that the Claimant's claims for notice pay and holiday were contractual claims. The counter claimed loss arises out of an alleged failure by the Claimant to renew the Respondent's domain name. I was of the preliminary view that the ET had no jurisdiction to hear this claim, and that it should be struck out, as the mere fact that claims for notice and unpaid holiday pay were pleaded in an ET1, absent any sufficient facts for the basis on which the claims were made, did not mean they were contractual as opposed to statutory claims. However, I was of the view that the proportionate and fair thing to do in this case was to give the Claimant the opportunity to clarify by way of Further and Better Particulars the basis on which these claims are put. In the event, that they are put on a statutory rather than a contractual footing, then the counterclaim should be withdrawn or it will be struck out.

Employment Judge Phillips
16 July 2018
London South