EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Sweeney	**and**	Rundle & Co Ltd

At an Open Attended Preliminary Hearing

Heard at: Leicester

On: Monday 10 September 2018

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Ms J Harrison, Solicitor
Respondent: Mr S Khan of Counsel

JUDGMENT

1. As to the claim of direct sex discrimination, it having only little reasonable prospect of success, the Claimant is ordered to pay a deposit of £1,000 within 21 days of the issue of this judgment as a condition precedent of continuing with the claim. The appropriate notice is attached.

2. As to the claim of constructive unfair dismissal, it having only little reasonable prospect of success, the Claimant is ordered to pay a deposit of £1,000 within 21 days of the issue of this judgment as a condition precedent of continuing with the claim. The appropriate notice is attached.

3. It is to be noted that there are no other claims before the tribunal. Thus, for the avoidance of doubt, any purported counter claim (there not being a breach of contract claim) is formally dismissed.

REASONS

Introduction

1. The first item on the agenda today is the Respondent's application that the claim of sex discrimination be dismissed as having no reasonable prospect of success or a deposit order be made on the basis that it has only little reasonable prospect of success. The claim is one of direct sex discrimination pursuant to section 13 of the Equality Act 2010. Ms Harrison has clarified today that this is the only discrimination based claim. The comparator is Darren Connor.

2. The scenario is that in March 2017 Mr Connor, then being the Operations Director, resigned. He was on a contract with a 12 month notice provision. He was allowed to leave on reduced notice (which is not material to the issue) but, more important, the restrictive covenants in his contract of employment were waived.

3. The Claimant contrasts herself in this respect in that her having resigned the employment on 15 December 2017, with the employment to end because she gave notice on 15 March 2018, that she was held to the restrictive covenants. So, prima facie a clear-cut case of direct sex discrimination, the comparator being Mr Connor.

4. To determine this issue, I have had before me two bundles. I will use the Respondent's bundle as it essentially contains the same documents and will refer to pages therein with the suffix Bp. I have heard extensive written and oral submissions from both advocates.

5. This claim interfaces to the second claim that the Claimant brings, which is one of constructive unfair dismissal utilising the provisions commencing at section 95(1) (c) of the Employment Rights Act 1996. In other words, has the employer, by an act or a series of acts ending in a last straw, repudiated the contract of employment without reasonable and proper cause. The Respondent again applies for strike out

6. My power to strike out is contained within rule 37 of the Tribunal's 2013 Rules of Procedure (the Rules). As the parties know, it includes if I conclude that a claim has no reasonable prospect of success. I remind myself that of course to strike out a claim and thus deny access to the justice seat should be approached very carefully and that particularly in discrimination based cases it should be very much the exception. I also remind the parties that the Rules permit me if I decide not to strike out to consider in my discretion ordering a deposit pursuant to rule 39. Procedurally I can do this today even if it was not in the Respondent's application so long as of course the Claimant is given sufficient opportunity to show cause why a deposit should not be ordered. This has occurred.

7. The scenario as I see it on the papers as at present is as follows. The Claimant commenced her employment with the Respondent on 8 June 2015. She had a successful career with the business, which is a privately owned company with shareholders inter alia including the Govers.

8. The Claimant rose up the ranks as I have said and by circa March 2017 was the MD. Over her career she also became a substantial shareholder. Hilary Butler was the Finance Director. So the two wielded considerable managerial power. This bring me back to Darren Connor. In her grievance which was issued first on 26 March 2018 and then 10 April 2018 (Bp 97 – BP 98) and at paragraph 5 as to the decision to waive the restrictive covenants inter alia she stated:

> "… *Hilary decided that Rundle and Co Ltd would not hold Darren to his restrictive covenants and she emailed advising him of this. …*"

9. I have already observed today that this is unfortunately a disingenuous assertion and which does have an impact upon credibility. I say that because of the email traffic on the topic, which can be found between Bp 72 and 78. What it shows is that the Claimant took a full role with Hilary Butler in making the decision. The rationale behind deciding to waive Mr Connor's contractual commitments was on the basis that he had not been in the employment very long and was not seen as someone who would go to a competitor. That was something specifically asserted in the decision making process by the Claimant (as to which see Bp 72).

10. Moving forward in terms of core issues in this case, thereafter when the Claimant had become the MD, there came a time when she asked to be relieved of that post for the time being because of personal issues. Her requested was granted. Then what happened is that the employer could not recruit someone suitable so the Claimant agreed to go back into the role. She had a short period of sickness in September 2017 when there was a reorganisation of roles. Albeit the Claimant was unhappy with the changes she continued in the role.

11. I then note in terms of the general working environment that yes it was very demanding but the Claimant was highly paid for her services. Also from the documentation before me the employer gave her considerable inducements such as share options; and a discretionary bonus scheme. Those do not appear to me at first blush to be the actions of an unreasonable employer. But there are issues in dispute about whether by October 2017 – post the last real reorganisation - the Claimant was informing the Respondent that she was going to leave and if so why and so I will make no finding on that issue today.

12. However apart from the reliance on the reorganisation and overwork as reasons for the resignation as per the ET1, there is also detail on by now a difficult working relationship with Hilary Butler. Indeed it is described as "toxic" by the grievance investigator in May 2018 (see Bp101-113). However that grievance was raised by the Claimant only on 10 April 2018 after the Claimant's efforts via solicitors to get herself removed from the restrictive covenants failed and over three months after she had resigned. No mention is made of it in her written resignation to which I shall return. Furthermore, what is significant to me on the scenario is that on 14 December 2017 the Claimant received a very substantial discretionary bonus for her performance of £33,500. She only resigned the following day (Bp 81). In other words, I am with the Respondent's observation, being very experienced as I am in topics such as discretionary bonuses and their interface to departures, that the norm is that if a person has given notice of resignation, then they forfeit any bonus which has not at that stage been paid. So by waiting until the 15th, she got herself the bonus. I also note that tender of resignation letter (Bp 81), makes it quite clear that she is resigning because of a significant amount of personal upheaval. Furthermore the attachment (Bp92) entitled "*Dear All*" and sent to the Board members, is fond in its tone. It repeats that she is resigning from her position as Managing Director "*due to personal reasons*". She sets out her contractual notice period and that therefore:

> "… *unless advised otherwise … my final day of employment … will be the 15th March 2018.*
>
> *I would like the board to know that I will do everything I can to assist in the*

transfer of my responsibilities up to and during my period of leaving.

I would also like to take this opportunity to wish the board and the company every good fortune in the future.

Yours sincerely

…"

13. I observe despite the valiant attempts of Ms Harrison to the effect that employees often do not set out concerns that have led them to resign, that nevertheless taken at face value this letter flies in the face of the Claimant resigning because of repudiatory actions by her employer.

14. What then happened however is that the Claimant made plain that she would like to be able to contact her agents (see Bp 83). So, not just informing her work colleagues that she would be leaving (which would be normal) but …*"I want to let my "old" agents know personally, so I'd appreciate being informed when the board decide to inform the back office or advertise the role …*"

15. Incidentally, this letter had been penned to Hilary Butler and the first line is kind: "*Happy New Year. Sorry to hear about your dad. …*" and it ends with the words: *"Kind Regards*". The Claimant cannot rely on the fact that the staff were informed she was leaving as a "last straw" because although she knew that would happen they got the email before she did. This is because of course by now she had resigned.

16. What then happened is that at Board level, there were obviously concerns that given the length of time the Claimant had been with the business and her very senior role as to whether or not her wanting to contact agents of the business was because she was of a mind to either go directly into competition or work for somebody else and use that information, which of course would be in breach of her restrictive covenants. Whether they were justified in forming that opinion is not for me today. Indeed I go further; the tribunal's focus is on events within its jurisdiction ending with the resignation.

17. In any event, on 18 January 2018 the employer, in what is a letter that was clearly drafted by its legal advisers (Bp 88 – 89), made plain that the Claimant would be held to her restrictive covenants and as to why. It obviously came as no surprise to the Claimant as to which see Bp 86:

"*I have already seek legal advice as I thought it may come to this, although I gave you guys the benefit of the doubt.*

…"

18. That shows the change of tone. Also at this stage the Claimant had solicitors issue a letter to the respondent on her behalf. I will not go into the contents of that letter because it is marked without prejudice but I would venture to observe that she is highly likely to be cross-examined in one way or another and because there is as with all the preceding correspondence which I have summarised no mention whatsoever of sex discrimination.

19. Suffice it to say that in an open letter from the Respondent's solicitors (see Bp 95) in dealing with issues as clearly set out there in, justification was made plain for why the restrictions would not be lifted, and reiterating about the content of the resignation letters (to which I have already referred) and the competition concerns (which again I have touched upon). Of course, that letter is an open letter and is therefore admissible. Again, therefore, what is clear from that letter is that sex discrimination is not addressed and because it had not been raised.

20. The first time the Claimant raised sex discrimination was in the grievance, to which I have already referred and which was issued in terms of the one that the Respondent says it got, although I accept there was an earlier one at the back end of March but assume it is the same, it is commencing at Bp 98. The Claimant now raised sex discrimination principally on the Connor point.

21. The Respondent fully investigated the grievance; the Claimant would say it was inadequate. However I observe having carefully considered the contents of the extensive grievance investigation report that by reference to such as the ACAS CPs it is a reasonably conducted investigation.

22. So, going back to the claim, the first application of the Respondent is apropos section 13 of the EqA. It was raised on the grounds that also this claim is vexatious. As Mr Khan has elegantly put it today, it has only really been deployed (he says) in order that the Claimant can engineer the release of her restrictive covenants and indeed part of her plea for remedy before the tribunal is in fact the removal of the restrictive covenants. Of course, that is not a matter for the tribunal's jurisdiction.

23. The position as I currently see it is that this claim is weak. I say that because on the face of it there is a clear distinction between the treatment of Connor and that of the Claimant. The issues otherwise relating to sex discrimination have gone. She had sought to bring a claim based upon alleged bullying and harassment by Hilary Butler of her as being of sex discrimination. Of course, she cannot deploy that because Hilary is self-evidently of the same gender and that was why it was made plain that it is not a head of claim today, although it was in the Claim Form.

24. I have concluded that on the face of it, this particular claim should not be struck out because of course of the dicta of the line of authority commencing with ***Alanwu.*** However, I have concluded that this head of claim has, on the face of it, only little reasonable prospect of success. I will come back to the amount of the deposit in due course.

The constructive unfair dismissal claim

25. If the repudiatory act is the failure to address the unreasonable behaviour of Hilary Butler, then why did the Claimant not resign long before she did? She resigned having waited to first get her discretionary bonus and then there are the resignation letters. The tenor of her communications with the Respondent only changes when she is told she is going to be held to the restrictive covenants. So the Claimant, who waits around for some months after the commencement of (on her description of it) the unreasonable behaviour by Hilary and the Board in terms

of the reorganisation and her role then cynically, on the face of it, stays around to get her bonus. She then writes friendly resignation letters and only changes her tune when her attempt to get out of the restrictive covenants fails.

26. I set that against the steps that the employer took to deal with the issues relating to the Claimant and Hilary (who were very much of equal status in this business) including that the latter home work as much as possible, and then the contents that I have read in the investigation report. What it means is that I consider that the Claimant has a mountain to climb in establishing that there was repudiatory conduct by her employer. Again, I will err on the side of caution against striking her out from the justice seat. However, I do conclude that her claim has only little reasonable prospect of success. Thus I also order a deposit.

The Deposit orders

27. It follows that I am going to make deposit orders on both fronts. The Claimant has substantial equity with her partner in her home. She is not dependant on state benefits and has for instance no onerous credit card commitments. It follows that I am persuaded that the appropriate order on each deposit order should be the sum of £1,000.

Observation

28. I say the following as an experienced trial Judge and in order that it might assist the parties. The evidence is that the Claimant has been unable to work due primarily to ill health since her leaving the Respondent. So, several months have now passed and the Respondent has not sought to argue before me that the Claimant is in breach of the covenants. Of course, I have no doubt that if she was, then there would by now have been an injunction proceeding taken in the High Court.

29. The Claimant has a substantial shareholding in the Respondent which is valued at approximately £61,000. As with many small businesses, there is a restriction on where they can be sold. So, on the face of it the Board would (or one of it) be the purchaser of the shares in the usual value way, although it appears that it is not in dispute that they are valued at about £61,000. So it may be that this case can be resolved by the Claimant being released from her restrictive covenants and paid out for the shares upon her withdrawing her claims. This of course would save the parties the five days of hearing as per the directions below and avoid litigation elsewhere.

ORDERS

1. This case is currently listed for 3 days before a full tribunal at the Leicester Hearing Centre commencing Monday 8 April 2019. There are of course current directions but I am going to now revise them. I take into account that the Claimant has already supplied a schedule of loss. The revised directions are as follows:

1.1 The Claimant will provide further and better particularisation of the constructive unfair dismissal claim only by **19 October 2018**. **By the same day**, she will provide a revised schedule of loss. This is because the following appears to engage in this claim. As the Claimant was off sick post her resignation but before the effective date of termination but only received statutory sick pay as per the contract of employment, then obviously she would only suffer losses for whatever period the tribunal decided at SSP. This is unless of course she can show that there would have been a point at which she would have been sufficiently recovered to have been able to resume the work were she found to be constructively unfairly dismissed. On the sex discrimination front it is not clear as to whether or not the Claimant is saying that by the time of her resignation she had been caused to be ill in some way or another which could be laid at the door of the Respondent. Thus, what it clearly means is that the current schedule of loss is going to have to be revised and obviously submissions made in respect of it. If the Claimant is going to rely upon medical evidence, she is going to have to disclose it. The Respondent may very well then wish to make application but we shall see. That is why I am requiring a revised schedule of loss.

1.2 The Respondent will reply, both to the particularisation and the schedule of loss by target date **9 November 2018**.

Discovery

1.3 The discovery process will be as follows:

(a) By **23 November 2018**, the Respondent will send the Claimant a chronological proposed trial bundle index. It will be double spaced. The Claimant will then reply thereto by **14 December 2018** inserting by brief description at the appropriate place, any additional documents she wants in the bundle. If she has got the same, she will send a copy for its inclusion to the Respondent. Otherwise, she will make plain that she requires the Respondent to place it in the bundle.

(b) Liberty to apply if there should be any contention in terms of the context of relevance and necessity.

1.4 By not later than **19 January 2019**, a single bundle of documents is to be agreed. The Respondent will have conduct of the preparation of the bundle. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into

consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the tribunal and the parties, notices of hearing, location maps for the tribunal and other documents which do not form part of either party's case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

1.5 By not later than **9 February 2019**, there is to be mutual exchange of witness statements. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. Witness statements should not routinely include a précis of any document which the tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the tribunal to draw from the document as a whole.

<u>The hearing</u>

2. As the Respondent proposes to call 8 witnesses, albeit the Claimant is only calling herself, I extend the time for the actual trial to 5 days, thus, adding on are 11 and 12 April 2019. Furthermore, I now order that the preceding Friday (5 April 2019) shall be a reading in day at which the parties' attendance will not be required. For the purposes of the reading in, via the Respondent, in advance of the reading in day, there will be delivered to the tribunal in triplicate the following:

2.1 Revised list of issues
2.2 Chronology
2.3 Cast list
2.4 Trial bundle
2.5 A combined indexed witness statement bundle.

3. Finally, the tribunal will first determine liability and, if applicable, then move on to determine liability.

Employment Judge P Britton
Date: 18 September 2018

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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